

Deepening Democracy? Dispute System Design and the Mediation of Contested Parades in Northern Ireland

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The design of democratic institutions is a critical factor in determining their capacity to forestall, or limit the escalation of, identity-based conflict. In particular, the incorporation of dispute resolution mechanisms in institutional structures can create new spaces that facilitate dialogue and, potentially, greater recognition between disputants. Institutions, though, do more than merely provide alternative or new fora for dialogue: they can also serve to frame the terms of such interaction and, in so doing, funnel and re-articulate conceptions of justice and the public interest. Furthermore, they can enable the “bottom-up” negotiation of “satisfiers”—those measures capable of meeting or accommodating the multiple interests at stake. In this way, institutional design can bear directly upon the quality of democratic dialogue, serving either to expand or diminish the reserves of political opportunity. We argue that focusing greater attention on the design of dispute resolution mechanisms can help counteract the polarizing tendencies of elite mobilization. As procedural devices of dialogic interaction, such mechanisms can build consensus about the conception of justice underpinning public life, and so provide societies with “morally defensible processes” capable of responding to conflict in politics.¹ This implies that such mechanisms can constrain political self-interest, cap expectations about what democracy can realistically deliver, and encourage hitherto weak or non-existent consensus.

The following section (Part I) relates dispute system design to theories of democratic dialogue, and in particular, Habermasian theories of communicative action. It develops the concept of “democratic triangulation,” which we use to illustrate the important role that alternative dispute

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¹ Amy Gutmann, *How Not to Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1, 1 (1999).

resolution (ADR) mechanisms can play in mediating the relationship between democratic institutions and normative cultural values. Part II documents the background to the Northern Ireland Parades Commission (the Commission), established in 1997 to invigorate efforts to resolve the seemingly intractable issue of contentious parades. We argue that while parade disputes evidence a “crisis consciousness at the periphery,”² the Commission demonstrates the contribution that dispute system design can make to the resolution of identity-based conflict. The Parades Commission—its structure and processes of framing and bargaining—is then examined in Part III, while Part IV of the Article returns to the concept of democratic triangulation, and analyzes the design strengths and weaknesses of the Parades Commission against this benchmark.

I. DISPUTE RESOLUTION AS A PROCEDURAL DEVICE OF COMMUNICATIVE ACTION

Sociological approaches to law have long encouraged an expansive vision of what legal institutions might achieve.³ Nonet and Selznick, for example, describe the ideal of “responsive law” as “a facilitator of response to social needs and aspirations.”⁴ Examples of design innovation typically include: de-centered nodes of governance which allow for wider participation and more nuanced discussion in democratic decisionmaking;⁵ public fora and collaborative ventures which capture, distill, and give voice to previously excluded narratives; monitoring and accountability mechanisms which provide early warnings and absorb disaffection before it can assume rhetorical capital; codes of practice and conduct which assist in stabilizing public expectations; and enhanced capacity for third-party intervention enabling the de-escalation of seemingly intractable conflicts. Our concern in this Article, however, is not with *legal* institutions per se, but rather with how

² JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 382 (William Rehg trans., MIT Press 1996) (emphasis omitted).

³ Following Cohen and Deason, we adopt Robert Keohane’s broad definition of institutions as “persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity, and shape expectations.” Amy J. Cohen & Ellen E. Deason, *Elements of Institutional Design for Conflict Resolution* 1 n.1 (Aug. 22, 2006) (unpublished manuscript, on file with Ohio State Journal on Dispute Resolution).

⁴ PHILLIPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 14–15 (2001).

⁵ See, e.g., LES JOHNSTON & CLIFFORD SHEARING, GOVERNING SECURITY: EXPLORATIONS IN POLICING AND JUSTICE 148–150 (2003).

law can construct, or leave open the possibility of, dispute resolution mechanisms beyond itself.

International human rights norms have emphasized that inclusive modes of governance are underpinned by a dialogic imperative. The preamble to the Framework Convention for the Protection of National Minorities, for example, states that "the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society."⁶ But legal norms can yield to prescription, and the "template of an ideal polity" has been "used as leverage to try to quell ethnic conflict."⁷ In this light, we stress from the outset that institutional design processes must be elicitive rather than prescriptive. Social interactions and the institutions through which they are processed are both constituted by and constitutive of the cultural context in which they operate.⁸ Manlio Cinalli thus argues that "the prescription of institutional solutions cannot be separated from the empirical assessment of relationships and exchanges across institutions and civil society."⁹ Similarly, John Paul Lederach states that "the design of conflict responses is a creative process that requires innovation and inventiveness in adapting to the dynamic and constantly evolving contexts of deep-rooted conflict."¹⁰ That is not to imply that any evaluation of a culturally situated example of institutional design will be of little heuristic value. Indeed, Jürgen Habermas acknowledges that

⁶ Framework Convention for the Protection of National Minorities pmb., February 1, 1995, Europ. T.S. No. 157, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>; see also Framework Convention for the Protection of National Minorities art. 6, 15, February 1, 1995, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>.

⁷ See Anne-Marie Slaughter, *Pushing the Limits of the Liberal Peace: Ethnic Conflict and the "Ideal Polity"*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 128, 141 (David Wippman ed., 1998).

⁸ See Cohen & Deason, *supra* note 3, at 6. (stating that "institutions are deeply entwined with social practices and thus are both shaped by and shape the societies in which they operate"); see also NONET & SELZNICK, *supra* note 4, at 14; Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1152 (1997); P.A.J. Waddington, *Controlling Protest in Contemporary Historical and Comparative Perspective*, in POLICING PROTEST: THE CONTROL OF MASS DEMONSTRATIONS IN WESTERN DEMOCRACIES 117, 138-39 (Donatella Della Porta & Herbert Reiter eds., 1998).

⁹ Manlio Cinalli, *Below and Beyond Power Sharing: Relational Structures Across Institutions and Civil Society*, in POWER SHARING: NEW CHALLENGES FOR DIVIDED SOCIETIES 172 (Ian O'Flynn & David Russell eds., 2005).

¹⁰ John Paul Lederach, *Building Mediative Capacity in Deep-Rooted Conflict*, 26 FLETCHER F. WORLD AFF. 91, 95 (2002).

one *should* seek to determine “the conditions for a rational political will-formation . . . at the social level of institutionalized processes of deliberation and decision making.”¹¹ Our analysis of the Parades Commission proposes that attention to the detail of dispute system design can help realize the ideal of responsive law—particularly during moments of “inertia.”¹² Moreover, in addition to serving their primary instrumental function, dispute resolution mechanisms can also serve to deepen democracy.

Despite the unremarkable nature of this claim, the connections between ADR mechanisms and the quality of democratic dialogue are relatively unexplored. While it has been suggested that “modern democratic processes can be thought of as mediation writ large,”¹³ Richard Reuben notes that “[w]ith rare exception, the question of the relationship between . . . democracy and dispute resolution generally, has simply fallen through the cracks of scholarly attention.”¹⁴ Joseph Stulberg asserts that “the mediation process can be used as an engine for constructive, democratic social change,”¹⁵ and building on this premise, Gemma Smyth urges that if “ADR theorists and practitioners are framers of democracy and ‘meaningful justice,’” greater consideration must be given to design issues. This is especially so given that “even minor variations in process and practice can produce quite different types of interactions.”¹⁶ As Axel Hadenius asserts, democratic development is contingent upon prevailing institutional conditions:

To serve a democratic function, the organizations in question should have deep popular roots, and a capacity to channel opinion from the bottom up. They should function autonomously of the state, yet they ought also to

¹¹ HABERMAS, *supra* note 2, at 340–41.

¹² *Id.* at 326.

¹³ Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 30 (2000).

¹⁴ Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 281 (2004). Examples are readily found: championing his conception of “reflective democracy,” Robert Goodin admits that he leaves both empirical inquiry and institutional-design considerations for discussion at a later date. ROBERT E. GOODIN, REFLECTIVE DEMOCRACY 18–19 (2003). Similarly, Manlio Cinalli concludes by “opening space for further empirical investigation of social and political processes beyond prescriptive discussions of desirable institutional arrangements.” Cinalli, *supra* note 9, at 184.

¹⁵ Joseph B. Stulberg, *Questions*, 17 OHIO ST. J. ON DISP. RESOL. 531, 537 (2002).

¹⁶ Gemma Smyth, *Considering Democracy and ADR: Diversity Based Practice in Public Collaborative Processes*, 19 WINDSOR REV. LEGAL & SOC. ISSUES 13, 22 (2005).

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have links, directly or indirectly, into the political sphere. Alongside this mobilizing and channelling function, moreover, an ability to bridge divisions and to interact with people of another orientation must be present. This requires that, within the organizational sphere, there be a conflict-dampening capacity: an ability to moderate, to discipline, and to negotiate. In this regard, the social context can be more favourable or less.¹⁷

We can elaborate on this generic paradigm by looking to the ideal speech conditions of Habermasian theories of communicative action. Habermas suggests that parties to a conflict can reach agreement only if significant background consensus exists, thereby limiting the number of issues which remain contested and removing certain issues from challenge altogether.¹⁸ In the absence of such consensus, parties will seek to further their own interests *strategically* rather than attempting to resolve the conflict *communicatively*.¹⁹ Any short-term resolution will be based on threats and strategic promises rather than negotiated bargains involving mutual compromises.²⁰ As

¹⁷ AXEL HADENIUS, INSTITUTIONS AND DEMOCRATIC CITIZENSHIP 101, 127 (2001). It has been argued that the social context in Northern Ireland tends towards the less favorable end of the spectrum for such "bottom up" democratization: "Those who cherish utopian hopes of building democracy from the local community level up have only to look at the reality of locally based community conflict on the parades issue to check their optimistic vision. The view that democracy should be based on participative community-based politics is untenable in Northern Ireland." Cathal McCall & Arthur Williamson, *Governance and Democracy in Northern Ireland: The Role of the Voluntary and Community Sector after the Agreement*, 14 GOVERNANCE 363, 372 (2001). It is also noteworthy that "the establishment of democratic institutions does not automatically yield political transformations toward[] democratic politics. In fact, many of the 'third wave' democratic transitions have yielded a co-existence of formal liberal democratic institutions and non-democratic politics." Kristian Stokke, *Building the Tamil Eelam State: Emerging State Institutions and Forms of Governance in LTTE-controlled Areas in Sri Lanka* 5, available at <http://folk.uio.no/stokke/Publications/Building%20the%20state.pdf>.

¹⁸ HABERMAS, *supra* note 2, at xvi–xvii, and 322–326; *see also* 2 HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 119–152 (Thomas McCarthy trans., Polity Press, 1987) [hereinafter THEORY OF COMMUNICATIVE ACTION].

¹⁹ Habermas states: "I call interactions 'communicative' when the participants coordinate their plans of action consensually, with the agreement reached at any point being evaluated in terms of the intersubjective recognition of validity claims." Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in THE COMMUNICATIVE ETHICS CONTROVERSY 60, 63 (Seyla Benhabib & Fred R. Dallmayr eds., MIT Press 1990).

²⁰ As Robert Goodin notes:

Rosenfeld points out, however, this theory presupposes *rational* discourse, and assumes certain substantive norms.²¹ It excludes, for example, conceptions of the good which reject prescriptive equality.²² It also rules out parties who hold incompatible metaphysical perspectives (deriving from dogma or ideology).²³ Thus,

[W]hether communicative action can carve out a common ground for justice encompassing all of its perspectives—depends on the nature of the procedural devices involved in communicative action as well as on the existence of material conditions making it plausible for the reversal of perspectives (undertaken by actors engaged in communicative action) to generate fruitful consensuses or compromises [T]he success of Habermas's proceduralism to level the playing field would appear to depend on whether the requisite levelling could be achieved through dialogue, or whether it calls for predialogical or extradiological adjustments.²⁴

Rosenfeld's argument points to the difficulty of gauging whether or not the disparate perspectives held by the parties to a particular conflict are so incompatible as to render them impervious to any procedural devices of

[t]he sequence of moves and countermoves in an ordinary mixed-motive game just involves each player doing the best she can for herself, given what the other has done or is expected to do. Bargaining, in contrast, involves give-and-take aiming, ultimately, at an agreed joint action. Bargaining, when successful, ends in an agreement, whereas the most we get with ordinary mixed-motive games is an equilibrium.

GOODIN, *supra* note 14, at 86.

²¹ Michel Rosenfeld, *Can Rights, Democracy, and Justice be Reconciled Through Discourse Theory? Reflections on Habermas' Proceduralist Paradigm of Law*, 17 CARDOZO L. REV. 791, 811 (1995–96).

²² *Id.* at 812.

²³ Habermas argues that “dogmatic worldviews and rigid patterns of socialization can block a discursive mode of sociation.” HABERMAS, *supra* note 2, at 325. Elsewhere, he suggests that democracy might accommodate anti-democratic views so long as any rule-breaking is conducted in a non-violent manner consistent with the constitution. See also GIOVANNA BORRADORI, PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA 41–42, 73–74 (2003). Also noteworthy here is the distinction made by Herbert Marcuse between “non-partisan tolerance” (“abstract” or “pure” tolerance) and “partisan” tolerance—which is always “intolerant toward the protagonists of the repressive status quo.” Herbert Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE 81, 85 (R. P. Wolff et al. eds., 1969; see also G. H. Fox & G. Nolte, *Intolerant Democracies*, 36 HARV. INT'L L. J. 1, 68 (1995).

²⁴ Rosenfeld, *supra* note 21, at 812, 814.

communicative action.²⁵ In identity-based conflicts, this suggests that there might at least need to be some underlying consensus about the values of democracy. As Smyth acknowledges, the concept of democracy being pursued will itself fundamentally shape the type of interactions sought.²⁶ While critical of Habermas' "serial" or "disjointed" approach to democratic deliberation (where *informal* deliberation must first force its way into the *official* political sphere),²⁷ Goodin presents his own model of "reflective democracy" which we adopt here as a yardstick.²⁸ He conceives of a polity which is "systematically responsive"²⁹—"deliberative in contradistinction to many opposites: adversarial, ill-considered, individualistic, self-interested, aggregative."³⁰ Properly crafted deliberative processes can produce preferences which are more empathetic, considered, and far-reaching,³¹ and where inputs (their inclusivity and quality) matter (as opposed to a Schumpeterian focus on bare aggregative outputs).³² Institutions should

²⁵ *Id.*

²⁶ See Smyth, *supra* note 16, at 15, 17, 22. In periods of transition from conflict or totalitarian rule to peace or more democratic forms of governance, some agreement about the goals of transition may be necessary so that parties are amenable to dialogic will-formation. For discussion of nominally democratic but potentially divergent values underpinning interventions in parade disputes, see Michael Hamilton, *Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-Limiting Principles in the Context of Transition*, OXFORD J. LEGAL STUD. (Nov. 29, 2005), available at <http://ojls.oxfordjournals.org/cgi/rapidpdf/gqi038v1>.

²⁷ Habermas views communicative action as being dependent on civic impulses which bring conflicts from the periphery into the center of the political system. See HABERMAS, *supra* note 2, at 330. He posits that there are two tracks of opinion-and will-formation. The first (constitutional) track is that of democratic proceduralism and institutionalized deliberation which extends only to *political communities* *Id.* at 305–06. The second (informal) track comprises those other "culturally mobilized publics" and networks—the general and unconstrained public sphere. *Id.* at 301. Describing this "sphere of civil society," Habermas states that "its institutional core comprises those nongovernmental and non-economic connections and voluntary associations that anchor the communication structures of the public sphere in the society component of the lifeworld." *Id.* at 366–367.

²⁸ Goodin, *supra* note 14, at 172–74.

²⁹ *Id.* at 1, 163 (citing John D. May, *Defining Democracy: A Bid for Coherence and Consensus*, 26 POL. STUD. 1 (1978)).

³⁰ *Id.* at 3–4.

³¹ *Id.* at 7.

³² *Id.* at 9, 153–157; HABERMAS, *supra* note 2, at 332; see also J.A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (2d ed. 1947). Schumpeter's theory of democracy prioritizes the centrality of competitive elections whereby elites (constituted as political parties) present their respective policy packages to the electorate. The

attend and respond to individuals' arguments and reasons—not merely their “bottom lines.”³³ The deliberative endgame for Goodin is that people be “imaginatively present” rather than necessarily being “conversationally present.”³⁴ Setting aside both Rosenfeld's caveat about the prerequisite material conditions for communicative action, and Goodin's critique of Habermas's structuration of the public sphere, we focus in this Article on an example of a “procedural device” that might facilitate the emergence of background consensus and the culling of oppositional preferences.

The need for background consensus suggests dual—and mutually reinforcing—roles for the procedural devices of dispute resolution: (1) a proactive preparatory (pre- or extra-dialogical) process which frames the dispute and seeks to establish a minimum consensus about the defining parameters; and (2) a communicative bargaining process which builds on this foundation with a view to encouraging sustainable, long-term agreement. This urges a more nuanced approach to the dialectics of democratic consolidation, i.e., the question of whether democratic culture is a prerequisite for, or consequence of, the establishment of democratic institutions.³⁵ It challenges the idea that democratic culture is a prerequisite for the establishment of democratic institutions.³⁶ It also challenges the argument that the establishment of democratic institutions is a necessary precursor to the development of democratic culture.³⁷ As neither culture nor institutions are inert and non-reflexive, the protean relationship between the two can be mediated by these procedural devices of framing and bargaining. This model of “democratic triangulation” implies a cyclical budding of institutional reform and normative values, the synergy of which denies institutional or cultural factors

aggregate vote is the only lever by which individual voters can influence policy formulation.

³³ GOODIN, *supra* note 14, at 16.

³⁴ *Id.* at 171.

³⁵ See DAVID CHANDLER, BOSNIA: FAKING DEMOCRACY AFTER DAYTON 12–13 (2d ed. 1999) (citing Richard Rose, *Where are Post Communist Countries Going?*, 8 J. OF DEMOCRACY 92, 97 (1997)).

³⁶ See, e.g., Francis Fukuyama, *The Primacy of Culture*, 6 J. OF DEMOCRACY 7, 8–9 (1995). Fukuyama argues that “social engineering on the level of institutions has hit a massive brick wall.” *Id.* at 9. We do not, though, underestimate the role of culture—as Frank Wright argued, cultures “are systems of restraint upon mimetic rivalry. Without culture, mimesis can expand without limits.” FRANK WRIGHT, NORTHERN IRELAND: A COMPARATIVE ANALYSIS 21 (Gill & Macmillan eds., 1987).

³⁷ See, e.g., Staffan Lindeberg, *The Surprising Significance of African Elections*, 17 J. OF DEMOCRACY 139, 146–48 (2006). For a useful critical overview of the literature on democratization, see CHANDLER, *supra* note 35, at 7–33.

a veto on democratic innervation. It describes an organic model of democratization in which dispute resolution mechanisms, beyond the conventional institutions of law enforcement (police, courts, etc.), can enable dialogue about contested conceptions of justice and the public interest. This, in turn, can deepen commitment to democratic values, generate shared expectations, and catalyze reforms in unresponsive institutions, ultimately leading to the convergence of institutional and cultural values (or as close an approximation thereto as is ever possible).

The Northern Ireland Parades Commission provides a useful case study rather than a perfected or immediately transposable blueprint. It holds a light to the failure of liberal democratic pluralism to provide a totalizing foil to the escalation of ethnic and religious tensions, and lends itself to analysis for at least four further reasons. First, as we describe below, the establishment of the Commission in 1997 was an urgent response to widespread inter-communal violence and disorder, and an indictment on the legal mechanisms then in place to regulate public processions.³⁸ Given that institutional reform and innovation is often crisis-led, the bargaining systems that develop when overburdened state mechanisms of social integration give way are deserving of close empirical scrutiny. Second, the Commission also represents an attempt to address longstanding structural inequalities in the public sphere. The Commission template therefore illustrates the potential capacity of an institution to address entrenched identity-based conflict and deepen the roots of democratic governance. Arguably, this is achieved by ensuring that the body's membership is broadly representative of the affected constituencies, by enabling and facilitating greater involvement of civil society in dispute resolution processes, and by focusing on redefining the contested "public interest" on a cross-communal basis. Third, the substantive work of the Parades Commission—regulating access to public space—itself links the themes of space, public power, and democratic participation. Contestation over access to public space and the transgression of territorial boundaries often has symbolic purchase as a metaphor for the nature of the polity—the mobilization of the Civil Rights Movement in both the United States and Northern Ireland being a prime example.³⁹ Finally, the novel institutional characteristics of the Parades Commission themselves recommend it as a

³⁸ See Imelda McAuley, *Reforming the Law on Contentious Parades*, 1998 PUB. L. 44, 51.

³⁹ See, e.g., *Selma Blow by Blow*, in BERTRAM LEVINE, *RESOLVING RACIAL CONFLICT: THE COMMUNITY RELATIONS SERVICE AND CIVIL RIGHTS 1964–1989*, at 45–73 (2005); NEIL JARMAN & DOMINIC BRYAN, *FROM RIOTS TO RIGHTS: NATIONALIST PARADES IN THE NORTH OF IRELAND 59–84* (1998).

case study. The body has both adjudication and mediation functions, and the benefits and disadvantages of this hybrid structure are instructive in designing institutions that are at once responsive and capable of both formulating and advancing long-term democratic policy objectives.⁴⁰

II. CRISIS CONSCIOUSNESS AND PARADE DISPUTES IN NORTHERN IRELAND

Northern Ireland is a complex modern industrial society with large disparities in class and wealth.⁴¹ It suffers from many of the same social and economic problems as other Western European and North American countries.⁴² It is, however, a transitional society emerging from years of violent conflict.⁴³ Of the 1.7 million populace, approximately 46% regard themselves as belonging to the Protestant community (and, for the most part, are ascribed as "Unionist" or "Loyalist" as they wish to remain part of the United Kingdom) and 40% to the Catholic community (who, for the most part, wish to be part of a politically united Ireland, and hence are ascribed as "Nationalist" or "Republican").⁴⁴ These divisions have been manifested in many different contexts including employment and education.⁴⁵ Divisions have also resulted in territorial separation along communal lines.⁴⁶ In both urban and rural areas, public space and housing is often defined as "Protestant" or "Catholic."⁴⁷ In Belfast, sporadic violence and the fear of attacks from the other community has led to the building of "peace walls"

⁴⁰ See *infra* discussion Part III.B(2).

⁴¹ See, e.g., PAUL BEW, PETER GIBBON & HENRY PATTERSON, *NORTHERN IRELAND 1921–1994: POLITICAL FORCES AND SOCIAL CLASSES* (1995).

⁴² For a broad comparative perspective, see WRIGHT *supra* note 36.

⁴³ See, e.g., Colm Campbell & Fionnuala Ní Aoláin, *Local Meets Global: Transitional Justice in Northern Ireland*, 26 FORDHAM INT'L L. J. 871 (2003); Christine Bell, *Dealing with the Past in Northern Ireland*, 26 FORDHAM INT'L L. J. 1095 (2003); Angela Hegarty, *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 FORDHAM INT'L L. J. 1148 (2003); Kieran McEvoy & John Morison, "'Beyond the Constitutional Moment': Law, Transition and Peacemaking in Northern Ireland", 26 FORDHAM INT'L L. J. 961 (2003).

⁴⁴ Figures based on the 2001 Northern Ireland census. See also Tom Hadden, *Putting People into their Boxes*, FORTNIGHT No. 411, Feb. 2003, at 6.

⁴⁵ JOHN MCGARRY & BRENDAN O'LEARY, *EXPLAINING NORTHERN IRELAND* 265–307 (1995).

⁴⁶ BRENDAN MURTAGH, *THE POLITICS OF TERRITORY: POLICY AND SEGREGATION IN NORTHERN IRELAND* 31–42 (2002).

⁴⁷ *Id.*

between “interface” areas.⁴⁸ Towns and villages are also often viewed as being “Protestant” or “Catholic” with objects like war memorials or churches becoming ethnic markers.⁴⁹ Indeed, ritual practices (including commemorations, parades, and demonstrations) have played an important performative role in defining communal identities. Within the Protestant community, local marching bands and organizations such as the Orange Order, the Apprentice Boys of Derry, and the Royal Black Institution organize a wide range of parades. The majority of these events occur between April and August, which is a period commonly referred to as “the marching season.” The best known parades are those held on the Twelfth of July, commemorating Protestant King William’s victory over Catholic King James at the Battle of the Boyne in 1690.⁵⁰ While there are similar organizations in the Catholic community (such as the Ancient Order of Hibernians), they organize fewer parades, and these generally have less political significance than those organized by local branches of the Orange Order (known as Loyal Orange Lodges, LOL). Some more politically oriented demonstrations are organized by Republican groups to commemorate the Easter Rising, the Hunger Strike (May), and Internment (August). There is also a large event held annually at the end of January in Derry to commemorate Bloody Sunday.⁵¹ Parades sustain a sense of locality and territory. In this sense, parade routes can become determinants of spatial inclusion and exclusion, and residents of the areas through which they pass sometimes feel threatened. Processions, demonstrations, commemorations, feast days, and even funerals have long provided the context for public disorder in Northern Ireland, and parades were described as the “distinguishing public order challenges” in Northern Ireland at the close of the twentieth century.⁵²

⁴⁸ See MARY CONWAY & JONNY BYRNE, INSTITUTE FOR CONFLICT RESEARCH, *INTERFACE ISSUES: AN ANNOTATED BIBLIOGRAPHY* (2005).

⁴⁹ See PETER SHIRLOW & BRENDON MURTAGH, INSTITUTE FOR CONFLICT RESEARCH, BELFAST: SEGREGATION, VIOLENCE AND THE CITY 48–56 (Pluto Press 2006); NEIL JARMAN, NO LONGER A PROBLEM? SECTARIAN VIOLENCE IN NORTHERN IRELAND (2005).

⁵⁰ See DOMINIC BRYAN, ORANGE PARADES: RITUAL TRADITION AND CONTROL 118–138 (2000).

⁵¹ See JARMAN & BRYAN, *supra* note 39, at 72–77; Neil Jarman & Dominic Bryan, *Green Parades in an Orange State: Nationalist and Republican Commemorations and Demonstrations from Partition to the Troubles, 1920–1970*, in *THE IRISH PARADING TRADITION: FOLLOWING THE DRUM* 95–110 (Tom Fraser ed., St. Martin’s Press 2000) [hereinafter Jarman & Bryan, *Green Parades*].

⁵² A NEW BEGINNING: POLICING IN NORTHERN IRELAND: THE REPORT OF THE INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND 53 (1999) [hereinafter

During the year 2004–2005, there were 3,342 parades in Northern Ireland of which the largest number, 2,526, were categorized as “loyalist,” whilst 195 were described as “others,” and 621 as “nationalist.”⁵³ Out of this total, 229 parades were deemed to be “contentious” by the police and Parades Commission.⁵⁴ “Contentious” parades often require a heavy police presence and may be restricted.⁵⁵ In 2004–2005, 158 parades had restrictions imposed upon them—the majority of these were route restrictions, but restrictions were also often imposed on the timing of the parade, the music to be played, the specific bands allowed to participate, and the dress of participants.⁵⁶ As these figures indicate, parades have played a more central role in Protestant/Unionist/Loyalist political and religious cultural practice than in the Catholic/Nationalist/Republican community.⁵⁷ Indeed, the Catholic community has never been accorded the same access to public space.⁵⁸ This could partly be explained by the fact that the law accorded a wide discretion to the then Royal Ulster Constabulary (RUC),⁵⁹ membership of which was predominantly drawn from the Protestant community (in 1998, only 8% of its members were Catholics).⁶⁰ In addition, the statutory criteria gave primacy to

PATTEN REPORT], available at <http://www.belfast.org.uk/report.htm>; see also DAVID W. MILLAR, QUEEN’S REBELS: ULSTER LOYALISM IN HISTORICAL PERSPECTIVE 69 (1978); Sean Farrell, *Recapturing the Flag: The Campaign to Repeal the Party Processions Act 1860–1872*, 32 EIRE-IRELAND 52, 70 (1997); Jacqueline Hill, *National Festivals, the State and ‘Protestant Ascendancy’ in Ireland, 1790–1829*, 93 IRISH HIST. STUD. 30, 30 (1984).

⁵³ PARADES COMM’N, SEVENTH ANNUAL REPORT 2004–2005, at 7 (2005).

⁵⁴ *Id.*

⁵⁵ See, e.g., Dominic Bryan, *Drumcree: Marching Towards Peace in Northern Ireland*, in JÖRG NEUHEISER & STEFAN WOLFF, PEACE AT LAST? THE IMPACT OF THE GOOD FRIDAY AGREEMENT IN NORTHERN IRELAND 94–110 (2002).

⁵⁶ PARADES COMM’N *supra* note 53

⁵⁷ Jarman & Bryan, *Green Parades*, *supra* note 51, at 95–110.

⁵⁸ *Id.*

⁵⁹ Prior to the establishment of the Parades Commission, parades and counter-demonstrations were governed by the *Public Order (Northern Ireland) Order* 1987. See, e.g., Brigid Hadfield, *Public Order Police Powers and Judicial Review*, 1993 CRIM. L. REV. 915. Professor David Feldman described these discretionary powers as being “staggeringly wide,” for they failed “to provide narrowly drawn, reasonable, objective, and definite standards to guide the exercise of discretion.” DAVID FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES 821–22 (1993).

⁶⁰ PATTEN REPORT, *supra* note 52, at 82. Due to fifty-fifty recruitment provisions, almost 20% of regular officers are now from the Catholic community, with a target to meet the Patten goal of 30% by 2010. See The Office of the Oversight Commissioner, available at <http://www.oversightcommissioner.org/> (follow, “Reports, Composition and Recruitment” hyperlink; then follow “Overseeing the Proposed Revisions for the Policing

the potential for disorder as the basis for restricting public events, and so the police generally yielded to the greatest threat.⁶¹ Consequently, the law was widely criticized for providing “an incentive for those who threaten disorder.”⁶²

When parade disputes escalated in the mid-1990s,⁶³ a number of mediative interventions occurred (sometimes concurrently) outside of the legal framework. On occasion, these involved local church leaders, representatives of the business community, local politicians, and sometimes

Services of Northern Ireland - Report 13 - Published 09.06.2005” hyperlink); see also RONALD WEITZER, *POLICING UNDER FIRE: ETHNIC CONFLICT AND POLICE-COMMUNITY RELATIONS IN NORTHERN IRELAND* (1995); MARY O’RAWE & LINDA MOORE, COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *HUMAN RIGHTS ON DUTY: PRINCIPLES FOR BETTER POLICING—INTERNATIONAL LESSONS FOR NORTHERN IRELAND* (1997).

⁶¹ One example is provided by the case of *An Application by McManus for Judicial Review* (NIQB, May 4, 1990) (LEXIS, Northern Ireland Reported and Unreported Cases). Here, the organizer of a republican Hungerstrike Commemoration parade, notified to take place on May 6, 1990 through Belfast city center, challenged the police decision to re-route the parade away from the city center on the basis of a purported risk of serious public disorder. *Id.* at 1. It emerged that the police concern was not that the parade of itself would be disorderly, but that a parade “by this organisation may well attract to the city centre persons opposed to the ideals of the marchers and that serious public disorder will result.” *Id.* at 4. Arguing that the police direction was discriminatory, counsel for the applicant pointed to the fact that the RUC had facilitated the Twelfth of July processions through a republican area despite the existence of a similar threat of disorder. *Id.* at 4. Furthermore, while Loyalist parades were allowed in Belfast city center, no Nationalist parades had been allowed in the city center since 1981. *Id.* at 4. In reply, the judge simply stated that “[t]his is a fact but having heard the Chief Superintendent I am satisfied that no such discriminatory policy exists or is applied by the police.” *Id.* at 4. Three cases—*R v. Secretary of State ex parte Breen* (NIQB, July 7, 1992) (LEXIS, Northern Ireland Reported and Unreported Cases), *Re Armstrong* (NIQB, 1992) (LEXIS, Northern Ireland Reported and Unreported Cases), and *In The Matter Of An Application By Gary Jones For Judicial Review* (NIQB, July 10, 1996) (LEXIS, Northern Ireland Reported and Unreported Cases)—involving police decisions *not* to give any directions for the re-routing of loyalist parades substantiate the view that Protestant/Unionist/Loyalist events were not generally predisposed to restriction. That said, police *did* restrict Orange marches in a number of areas—and did so increasingly after 1994—but because none of these decisions were the subject of a legal challenge, the judicial review cases viewed in isolation present a distorted picture.

⁶² PETER NORTH, OLIVER CRILLY & JOHN DUNLOP, *INDEPENDENT REVIEW OF PARADES AND MARCHES 1997*, at 128, 157 (1997) [hereinafter *THE NORTH REPORT*].

⁶³ There were parade disputes in approximately twenty to twenty-five towns and cities across Northern Ireland in 1996 and 1997. See NEIL JARMAN ET AL., *POLITICS IN PUBLIC: FREEDOM OF ASSEMBLY AND THE RIGHT TO PROTEST: A COMPARATIVE ANALYSIS* 27–30 (1998).

also the police. This undoubtedly encouraged “forum shopping,” where parties participated only in those processes they believed would deliver their strategic goals. In 1995, a contentious parade from Drumcree Parish Church in the town of Portadown resulted in the Mediation Network organization⁶⁴ being invited by the assistant chief constable to mediate between representatives of the Orange Order, the Garvaghy Road Residents Association (GRRC), and the RUC.⁶⁵ These talks took the form of “shuttle mediation” (or “intermediation”), and three days into the impasse, against a background of heightened security fears, an accommodation was reached between residents’ leaders and the police.⁶⁶ This entailed a limited parade (involving only the local Portadown District Orange Lodge) along the Garvaghy Road.⁶⁷ During the same year, in Belfast, only two out of a notified twelve Loyalist parades were allowed by the police to pass along the Lower Ormeau Road in 1995.⁶⁸ Behind the scenes mediation, facilitated by Quaker House, resulted in an unprecedented agreement signed on July 10 by the Lower Ormeau Concerned Community (LOCC) and Ballynafeigh District Orange Lodge.⁶⁹ While this agreement broke down, it was used by the police as the template for future decisions—no parades would be allowed unless agreement was reached.

⁶⁴ Now “Mediation Northern Ireland.” This is an independent, civil society organization.

⁶⁵ See BRENDAN MCALLISTER & JOE CAMPBELL, STATEMENT ISSUED BY THE MEDIATION NETWORK IN JULY 1996 REGARDING THEIR ROLE IN THE NEGOTIATIONS IN DRUMCREE IN 1995 (1996), available at <http://cain.ulst.ac.uk/issues/parade/docs/mn13796.htm>.

⁶⁶ *Id.*

⁶⁷ *Id.* The basis of this accommodation, however, remains a matter of dispute—the then Chief Constable, Sir Hugh Annesley, later denied that the Acting Deputy Chief Constable, Ronnie Flanagan, had given any indication to residents that future parades would only take place with the consent of the local community (despite this assurance being witnessed by Mediation Network). See also BRENDAN MCALLISTER, MEDIATION AND THE DRUMCREE CONFLICT: THE POTENTIAL FOR INTERVENTION IN 2000, at 5–6 (2000); NEIL JARMAN & DOMINIC BRYAN, PARADE AND PROTEST: A DISCUSSION OF PARADING DISPUTES IN NORTHERN IRELAND 62–63 (1996); THE NORTH REPORT, *supra* note 62, at 34.

⁶⁸ The two parades which were not restricted were the Orange parade on July 12 and the parade by the Apprentice Boys on August 12 that marked the anniversary of the “Relief of Derry.” See JARMAN & BRYAN, *supra* note 67, at 42–50, 72–73; see also GRAINNE KELLY & SUSAN ALLEN NAN, ART OF MEDIATION PROJECT, MEDIATION IN PRACTICE 63 (Grainne Kelly ed., 1998).

⁶⁹ JARMAN & BRYAN, *supra* note 67, at 63–67.

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In July 1996, Orangemen were initially prevented from marching to Portadown town center from Drumcree Parish Church along the Garvaghy Road by a decision by then Chief Constable, Sir Hugh Annesley.⁷⁰ This decision precipitated widespread public disorder on a scale rarely witnessed before in Northern Ireland. Orangemen and their supporters blocked major roads and hijacked vehicles.⁷¹ Despite marathon attempts to reach an accommodation,⁷² the decision was reversed on public order grounds following the murder of Michael McGoldrick, a Catholic taxi driver, and the parade was allowed to proceed.⁷³ This decision did nothing to reduce tensions. Nationalists and Republicans were outraged by the u-turn, and in the rioting and destruction of property which ensued, another civilian, Dermot McShane, was crushed to death by a police vehicle in Derry/Londonderry.⁷⁴ As David Feldman states, "[t]he way in which these matters were handled gave rise to further polarisation of the already divided community in Northern Ireland, and intensified suspicion of the motives of the RUC and unhappiness about the apparent vacillation of its Chief Constable."⁷⁵

Nonetheless, in August 1996, direct face-to-face meetings between residents and the Royal Black Preceptory (RBP) occurred in the towns of Bellaghy and Dunloy, and a series of meetings took place between the Apprentice Boys and the Bogside Resident's Group in Derry/Londonderry.⁷⁶ In Bellaghy, these talks resulted in a one-off written agreement in relation to the RBP parade on August 31, although no agreement was reached in either

⁷⁰ See generally CHRIS RYDER & VINCENT KEARNEY, *DRUMCREE: THE ORANGE ORDER'S LAST STAND* (2001) (providing a detailed narrative of the events at Drumcree). For a largely "Trimble-ite" perspective, see GORDON LUCY, *STAND-OFF! DRUMCREE: JULY 1995 AND 1996* (Ulster Society Ltd. 1996). For the perspective of the Garvaghy Road residents, see GARVAGHY RESIDENTS, *GARVAGHY: A COMMUNITY UNDER SIEGE* 142-67 (1999).

⁷¹ RYDER & KEARNEY, *supra* note 70 at 142.

⁷² *Id.* at 149-60. These talks were led by the Church of Ireland Primate, Archbishop Robin Eames, and the Roman Catholic Archbishop, Cardinal Cahal Daly.

⁷³ *Id.* at 165-68.

⁷⁴ COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *THE MISRULE OF LAW: A REPORT ON THE POLICING OF EVENTS DURING THE SUMMER OF 1996 IN NORTHERN IRELAND* 43-44 (1996).

⁷⁵ David Feldman, Society of Public Law Teachers, Address at the Meeting of the Public Law Section at the University of Birmingham, *Achieving Transparency and Accountability in Public-Order Decision-Making: Evaluating the North Report on Parades in Northern Ireland* (Apr. 5-6, 1997).

⁷⁶ KELLY & NAN, *supra* note 68, at 32-33, 36, 51-56.

Dunloy or Derry/Londonderry.⁷⁷ Indeed, the RUC increasingly made efforts to engage with both parties to disputes. In August 1996, for example, Ronnie Flanagan, then deputy chief constable, initially acted as an intermediary between Bellaghy Concerned Residents (BCR) and the RBP.⁷⁸ In the same year, in Newtownbutler:

[l]ocal RUC officers...took the initiative to begin a process of communication between the [Newtownbutler Area] residents association and the [Royal Black] Preceptory. The Chief Inspector for the area and his Superintendent devised a strategy between them; the Chief Inspector would work with the nationalist residents and the Superintendent with Preceptory members. Making it clear that the RUC did not want to lay ownership to any agreement or decision but wished to facilitate dialogue and keep lines of communication open, they initiated a series of meetings.⁷⁹

These meetings (each side meeting separately with the RUC) did not lead to agreement.⁸⁰ But on the day of the parade, facing a standoff between a reported 50 marchers and 150 protesters, RUC officers again acted as go-betweens by carrying messages from one group to another.⁸¹ A compromise was then proposed by the chief inspector which was accepted by members of Newtownbutler Area Residents Association (NARA).⁸² As Kelly notes, "[i]t is significant that although support for the RUC was at a very low ebb in the summer of 1996 (in both the Nationalist and Unionist communities) in the aftermath of Drumcree, the RUC could play a role at all."⁸³

⁷⁷ In both cases the parades were ultimately prevented from taking place. In Dunloy, when direct discussions broke down between the RBP and residents in August 1996, 150 residents gathered to protest against the RBP parade, and, following discussions with the police, the parade organizers agreed to a re-routing. KELLY & NAN, *supra* note 68, at 35–36. In Derry/Londonderry, following the breakdown of discussions (in which the BRG had argued that a solution in Derry should be linked to disputed Apprentice Boys parades in Bellaghy, Dunloy and the lower Ormeau) and against the background of the violence at Drumcree, the Secretary of State, Sir Patrick Mayhew, imposed a ban on all parades along part of the city wall in Derry between August 7–31, 1996. *Id.* at 56. This was the only occasion between 1987 and 1997 that the Secretary of State's powers under article 5 of the Public Order (NI) Order 1987 were used. The equivalent banning powers of the Secretary of State under the Public Processions Act have never been used.

⁷⁸ See KELLY & NAN, *supra* note 68, at 31–32.

⁷⁹ *Id.* at 45–46.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 48.

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By having to make decisions about parade routes, and then enforce those same decisions, the RUC's role was inevitably politicized.⁸⁴ As long ago as 1985, then Chief Constable Jack Hermon, stated that too much was expected of the police in effecting political and community reconciliation.⁸⁵ He argued that "it may perhaps be worth considering if responsibility for decisions on the holding and routing of parades should rest with an independent public tribunal."⁸⁶ A similar argument was made by Professor Brigid Hadfield in 1993.⁸⁷ Yet, it was not until 1998 that similar proposals were brought forward by the government following the recommendations of the Independent Review of Parades and Marches (the North Review).⁸⁸ This review reported after just six months of work in January 1997, and sought to encourage the participation of individual groups in the design of the processes affecting them:

The Review team directly invited written evidence from interested parties, placed advertisements in daily newspapers, and distributed 15,000 leaflets with the text of the advertisement to libraries and Citizens' Advice Bureaux. The team also visited the locations of some of the more contentious parades to gain a better appreciation of the local geography, observed certain parades, held 93 separate meetings involving more than 270 individuals, and, following an open tender, commissioned *Research*

⁸⁴ This point was highlighted in THE NORTH REPORT, *supra* note 62, at 135–36. See also Imelda McAuley, *supra* note 38 at 46.

⁸⁵ CHRIS RYDER, THE RUC 1922–2000: A FORCE UNDER FIRE 333 (Arrow Books 2000).

⁸⁶ RUC CHIEF CONSTABLE'S REPORT 1985, at xv. Sir John Hermon repeated this view ten years later, arguing that it was "absolutely essential" to establish an independent mechanism for deciding which marches went ahead rather than leaving it to the RUC. AUTHOR, TITLE, BELFAST NEWS LETTER, July 15, 1996. See also DOMINIC BRYAN, TOM FRASER, & SEAMUS DUNN, POLITICAL RITUALS: LOYALIST PARADES IN PORTADOWN 35 (1995); JARMAN & BRYAN, *supra* note 67, at 53 (citing Sinn Fein councillor, Barry McElduff, calling for the establishment of an independent Commission); JARMAN & BRYAN, *supra* note 67, at 79 (citing Ballynafeigh Orangeman Noel Liggett's support for a wider forum to discuss the parading issue, including "loyalist orders, local politicians, wider representatives and church leaders."); JARMAN & BRYAN, *supra* note 67, at 120–22 (supplying consideration of "A Parading Commission"); JARMAN & BRYAN, *supra* note 67, at 128–30 (providing consideration of "A Parading Tribunal" and "A Judicial Tribunal" respectively).

⁸⁷ Hadfield, *supra* note 59, at 924–25.

⁸⁸ THE NORTH REPORT, *supra* note 62. The three person review team, appointed by the Secretary of State, was led by Dr. Peter North (now Sir Peter), then Vice-Chancellor of Oxford University. The other two members were Fr. Oliver Crilly and the Very Rev. Dr. John Dunlop.

and Evaluation Services (based in Belfast) to conduct a major survey of the attitudes of the public towards parades. A number of smaller questionnaire-based surveys were also carried out.⁸⁹

Given that the North Review was only instigated following widespread violence associated with the 1996 Drumcree dispute, it supports Habermas's claim that a "*crisis consciousness at the periphery*"⁹⁰ sometimes has to make its way "into the core of the political system and there receive formal consideration" through "sensational actions" and "mass protests."⁹¹ It is significant, though, that the Parades Commission was designed outside of the political negotiations aimed at settling the constitutional conundrum and bringing finality to thirty years of intercommunal violence. The use of this exceptional ad hoc law reform mechanism was intended to shield the peace process from the fallout of parade disputes. As Campbell, Bell, and Ní Aoláin have noted, "institutional reform can occur incrementally outside the initial, formal, negotiating process, and works to address the causes of conflict on a more piecemeal basis. This practical reality means that institutional reforms become intrinsically tied up with the ongoing experiment of political accommodation."⁹²

The North Review represented an attempt to address the systemic failures highlighted by the partisan regulation of public processions in Northern Ireland. The challenge was to find some means of bringing Irish nationalism into the symbolic center of the regulatory apparatus without excluding Ulster unionism by doing so. The review team's key recommendation was the establishment of a five member independent body whose members would "have a geographical spread, and both cross-community and gender balance."⁹³ This body, to be called the "Parades Commission,"⁹⁴ would perform three broad functions:

⁸⁹ BRICE DICKSON & MICHAEL HAMILTON, RE-FORMING LAW REFORM IN NORTHERN IRELAND 20 (2000). "It is worth noting that, contemporaneously with the North Review, the Community Relations Council of Northern Ireland (an official but non-statutory body) commissioned and published (in January 1997) a report entitled *The Legal Control of Marches in Northern Ireland*, by Tom Hadden and Anne Donnelly." *Id.*

⁹⁰ HABERMAS, *supra* note 2, at 382 (emphasis in original).

⁹¹ *Id.* at 381.

⁹² Christine Bell, Colm Campbell & Fionnuala Ní Aoláin, *Justice Discourses in Transition*, 13 SOC. & LEGAL STUD. 305, 313 (2004).

⁹³ THE NORTH REPORT, *supra* note 62, at 141.

⁹⁴ *Id.* at 140.

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1. Allow interested parties to put their views forward about proposed parades,
2. Encourage them to settle difficulties locally, and where that proved impossible,
3. Itself to come to a view on what, if any, conditions should be imposed on contentious parades after an appropriately transparent process of examination of all the relevant issues against the background of reformed legal provisions.⁹⁵

The Commission was established on March 27, 1997, but with neither statutory foundation nor its proposed adjudicatory role.⁹⁶ The government felt that the latter required further time-limited consultation given the “radical and far-reaching”⁹⁷ impact of transferring powers from the police to the Commission. While there was no agreement reached over the Drumcree parade in 1997 (and the police decision to again allow it to proceed resulted in serious public disorder), violence was less widespread than during the previous two summers.⁹⁸ The situation was greatly eased when, in the early hours of July 11, the Orange Order announced that it would voluntarily re-route its Twelfth of July parades on the Lower Ormeau Road and in Newry, Armagh, and Derry/Londonderry.⁹⁹

The commissioners had no adjudicatory powers until February 1998 when the newly elected Labour Government enacted the Public Processions (NI) Act 1998 (the PPA). This placed the Commission on a legislative footing and transferred to it the adjudicatory powers previously held by the police—a move described by David Feldman as a “constitutional innovation.”¹⁰⁰ In 1998, it was therefore the Parades Commission—not the police—that re-routed the Drumcree parade. A massive security operation was put in place to enforce the Commission’s determination, and a protest involving thousands of people supporting the Orangemen ensued.¹⁰¹ It was

⁹⁵ *Id.* at 138.

⁹⁶ 289 PARL. DEB., H.C. (6th ser.) (1997) 508.

⁹⁷ *Id.*

⁹⁸ KELLY & NAN, *supra* note 68, at 57–61.

⁹⁹ Ryder and Kearney state that some members of the Orange Order now believe that then Chief Constable, Ronnie Flanagan, “exaggerated the security situation” (including information that an IRA sniper attack was planned for the march through the Shambles area of Armagh) to pressure the Orange Order into cancelling some of its contentious parades. *See* RYDER & KEARNEY, *supra* note 70, at 225–26.

¹⁰⁰ David Feldman, *supra* note 75, at 8. *See also* THE NORTH REPORT, *supra* note 62, at 158; Public Processions (Northern Ireland) Act, 1998, c.2, at § 2(2)(b).

¹⁰¹ *See* RYDER & KEARNEY, *supra* note 70, at 227–78.

only reduced after three young boys were burnt to death in Ballymoney after a petrol bomb was thrown at a house.¹⁰² Many moderate Orangemen withdrew from the protest, but an Orange protest at Drumcree has been continued up until the present day (September 2006).¹⁰³

While Drumcree—famously described in 1996 by a Protestant church leader as Northern Ireland’s “Chernobyl,” and now in its twelfth year—has remained relatively peaceful in recent years, on two occasions during the 2005 marching season, serious violence erupted in the aftermath of parades in other locations. On July 12, 2005, stones, bricks, petrol, and blast bombs were thrown by those opposed to the parade past the Ardoyne shop fronts in North Belfast.¹⁰⁴ In response, the police used water cannons and fired twenty-one “AEP impact rounds.”¹⁰⁵ Two months later, the worst rioting in Northern Ireland in almost ten years occurred after the Whiterock parade, originally planned for June 25, 2005, but held on September 10 after efforts to reach a local agreement broke down. Over the weekend of September 10–11, 2005, Loyalists (including Orangemen and those sympathetic to the Orange Order) engaged in serious violence:

It is estimated that 150 live rounds were fired at the police and military. In addition, hundreds of blast bombs and petrol bombs were thrown at the police, along with many other missiles including paving stones, bricks and bottles. 93 police officers were injured, along with at least two serious injuries in the military and an unknown number of civilian injuries. 167 vehicles were hijacked and set on fire and there was extensive damage to property. . . . [T]he [Police Service of Northern Ireland] discharged six live rounds, 238 AEP impact rounds and used water cannon[s] extensively. The

¹⁰² *Id.* at 270–73.

¹⁰³ A parade on September 23, 2006 marked day 3000th of the Drumcree protest. See Parades Commission, <http://www.paradescommission.org/parades/index.cfm/pkey/16945/details/true> (last visited Nov. 3, 2006).

¹⁰⁴ The parade was organized by Ligoniel True Blues LOL 1932, Ballysillan LOL 1891, and Earl of Erne LOL 647. For comment, see Michael Hamilton, *Parade Related Protest: Is it the “Taking Part” that Counts?*, JUST NEWS, July/Aug. 2005, at 3, available at <http://www.caj.org.uk/justnews/2005july.pdf>.

¹⁰⁵ “Attenuating Energy Projectiles.” These replaced “plastic baton rounds”—a weapon once frequently relied upon by the police in public order situations in Northern Ireland. HOUSE OF LORDS AND HOUSE OF COMMONS, JOINT COMMITTEE ON HUMAN RIGHTS, THE UN CONVENTION AGAINST TORTURE (UNCAT), NINETEENTH REPORT OF SESSION 2005–06, Vol.1 H.L. 185-I, H.C. 701-I, at 57, available at <http://www.parliament.the-stationery-office.co.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>.

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military discharged five live round[s] and 140 AEP impact rounds over the same period. That no one was killed and that there were so few serious injuries to police officers, the military or members of the public is remarkable.¹⁰⁶

In 2006, the Whiterock parade passed off peacefully (as did the contentious Tour of the North and Twelfth of July parades past Ardoyne), but many other parades in towns and cities across Northern Ireland remain contested, many accompanied by a risk of sectarian violence.¹⁰⁷ This suggests that, at some level, the interests of those on the periphery are not yet being adequately articulated through institutional channels. The question of whether or not the Parades Commission provides a model example of responsive law—the paradigmatic function of which is conceived by Nonet and Selznick in terms of “clarifying the public interest”¹⁰⁸—demands close attention to the organizational dynamics of that body, and to questions of “institutional design” and “institutional diagnosis.”¹⁰⁹ It is to these questions that our attention now turns.

III. THE PARADES COMMISSION—TOWARD RESPONSIVE LAW?

A. *An Independent and Representative Body?*

If institutions are to serve as “regularities in recurrent social situations,”¹¹⁰ it is important that they are broadly acceptable to the groups

¹⁰⁶ KEIR STARMER & JANE GORDON, N. IR. POLICING BD., REPORT ON THE POLICING OF THE ARDOYNE PARADES 12th JULY 2005 AND THE WHITEROCK PARADE 10th SEPTEMBER 2005, at 2 (2005), available at http://www.nipolicingboard.org.uk/word_docs/pdfs/sep_parades.pdf.

¹⁰⁷ See, e.g., PARADES COMMISSION, 2006–2007 PARADING IN A PEACEFUL NORTHERN IRELAND: FORWARD VIEW AND REVIEW OF PROCEDURES (2006), available at <http://www.paradescommission.org/publications/index.cfm>. Foreword by Roger Poole (Chairman of the Parades Commission), at 1: “[T]here is no sense of complacency within the Commission. We know that there are many outstanding difficulties where contentious parades and protests have yet to be fully addressed.” Roger Poole, Chairman of the Parades Commission, *Forward* to the PARADES COMMISSION, 2006–2007 PARADING IN A PEACEFUL NORTHERN IRELAND: FORWARD VIEW AND REVIEW OF PROCEDURES (2006), available at <http://www.paradescommission.org/publications/index.cfm>.

¹⁰⁸ NONET & SELZNICK, *supra* note 4, at 109.

¹⁰⁹ *Id.* at 111 (emphasis omitted).

¹¹⁰ INSTITUTIONAL DESIGN, RECENT ECONOMIC THOUGHT SERIES 5 (David Weimer ed., Kluwer Academic Publishers 1995) (citing ANDREW SCHOTTER, *THE ECONOMIC THEORY OF SOCIAL INSTITUTIONS* (1981)).

and individuals subject to their decisions. New institutions, however, cannot easily draw upon pre-existing modes of legitimacy (either political or judicial), and need quickly to establish their own credibility base. Cohen and Deason note that the public/private affiliation of an institution "is relevant to its source of legitimacy, regulatory authority, and/or coercive ability."¹¹¹ They argue that government sponsorship can either increase legitimacy or "detract from legitimacy by making it difficult to build trust."¹¹² Where the government and its agencies of enforcement (the police and criminal justice system) have themselves been implicated in the conflict, the independence of any regulatory authority is likely to be of paramount importance—at least, until new structures become embedded and are able to attract cross-community support. In this way, a regulatory body that incorporates dispute resolution mechanisms, situated independently between civil society and the institutions of government, can serve a mediating role. This triangulation prevents the new dispute resolution body from being tainted by the legacy of partisanship, provides a forum for greater civil society involvement in decisions (potentially contributing to dialogue about underlying contested values), and enables the fledgling structures of the (here, transitional) polity to develop stronger roots.

A second means of enhancing the persuasive authority of an institution, however, is to include representation from the competing factions upon it. This approach is a central tenet of the doctrine of consociationalism.¹¹³ Aside from the essentializing nature of any representativeness requirement, it is unclear whether consociational theory requires that group representation be prioritized in *all* public institutions, however distanced from central government.¹¹⁴ Erik Luna favors the checks and balances provided by "institutionalized 'devil's advocacy' with an appointed individual or group required to present opposing viewpoints."¹¹⁵ Similarly, John McGarry and Brendan O'Leary maintain that "[i]nclusion in power-sharing coalitions . . .

¹¹¹ Cohen & Deason, *supra* note 3, at 16.

¹¹² *Id.* at 16.

¹¹³ Consociationalism, first formulated by Arend Lijphart, is a form of multi-ethnic power sharing often regarded as suitable for societies riven by identity-based conflict. See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* (Yale University Press 1977).

¹¹⁴ George Monbiot notes the phenomenon of "photocopy democracy" whereby at each stage of removal—each copy—"democracy becomes greyer and harder to decipher." GEORGE MONBIOT, *THE AGE OF CONSENT: A MANIFESTO FOR A NEW WORLD ORDER* 48 (2003).

¹¹⁵ Erik Luna, *Race, Crime and Institutional Design*, 66 *LAW & CONTEMP. PROBS.* 183, 198 (2003) (citing Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 *CORNELL L. REV.* 549, 592–93, 596–600 (2002)).

can make radicals less extreme, because it provides them with opportunities to have their concerns addressed constitutionally, and gives them a stake in the system. Inclusion can strengthen the position of moderates within radical factions”¹¹⁶ Brian Barry, though, is less enthusiastic about the capacity of such arrangements to deliver consensual bargaining. Barry suggests that “[w]hat we might find out by experience is that institutionalizing group representation offers opportunities and incentives for political entrepreneurs to whip up intragroup solidarity and intergroup hostility in the pursuit of power.”¹¹⁷

The *North Report* recommended that the Parades Commission be both independent *and* representative. The independence of the Commission was to be “given an appropriate statutory basis.”¹¹⁸ The PPA, however, makes no reference to the Commission’s “independence,” and there is room for debate about how independent from government the body ought to be.¹¹⁹ On the one

¹¹⁶ JOHN MCGARRY & BRENDAN O’LEARY, *THE NORTHERN IRELAND CONFLICT: CONSOCIATIONAL ENGAGEMENTS* 25 (Oxford University Press 2004).

¹¹⁷ Brian Barry, *Second Thoughts—and Some First Thoughts Revived*, in *MULTICULTURALISM RECONSIDERED: CULTURE AND EQUALITY AND ITS CRITICS* 204, 211 (Paul Kelly ed., Polity Press 2002).

¹¹⁸ THE NORTH REPORT, *supra* note 62, at 142. When it was established, it was argued that the Commission should be categorized as an “independent statutory body” (thus technically falling outside the remit of the Commissioner for Public Appointments). This was confirmed in a letter from Mr. A.J. Howie (Machinery of Government and Standards Group, Cabinet Office) to Mr. J.M. Steele (then Director of Policing and Security, NIO) dated February 11, 1997 (on file with authors). The letter stated:

[T]he Commission will have a unique role, and may have decision-making and ombudsman-type powers, which makes it difficult to fit neatly into any one category. Moreover, it will presumably need to be seen to be as independent from Government as possible. We therefore suggest that . . . the Commission should be set up as an independent statutory body.

Letter from A.J. Howie to J.M. Steele (Feb. 11, 1997). The Commission, though, is now recognized as a “Tribunal Non-Departmental Public Body.” Application of John Joseph Duffy for Judicial Review [2006] NIQB 29 (N. Ir.) (referencing the judge’s statements at paragraph four regarding the content of affidavits submitted by the Parades Commission). A “Tribunal Non-Departmental Public Body” is one that operates “with jurisdiction in a specialised field of the law, independently of Government, usually concerned with the rights and obligations of individuals towards a branch of Government or other public authority relating to specialist areas of the law.” See SCOTTISH EXECUTIVE, REVIEW OF COMMON POLICE SERVICES at 2: CPSP.PB(4.5)E—GOVERNANCE—STRUCTURAL MODELS, available at <http://www.scotland.gov.uk/Topics/Justice/Police/17558/StructuralModels> (defining “Tribunal Non-Departmental Public Body”).

¹¹⁹ The independence of the Commission is potentially compromised by the Secretary of State’s residual powers to regulate public processions and related protests.

hand, the Commission could become more tribunal like, with, for example, appointments being made by the Lord Chancellor. Alternatively, the Commission could become a more democratic body, with closer links to the Northern Ireland Assembly. According to the latter model, agreements reached between local political representatives would then be “sold” to their respective constituents. As it stands, the Commission is “a mongrel—not quite judicial, not really democratic.”¹²⁰ Consequently, at least in part, “the Parades Commission has to measure its success by the ability of the police to manage public order.”¹²¹

The only stipulation in relation to the membership of the Commission is contained in Schedule 1, paragraph 2(3) of the PPA, which requires the secretary of state, in making the appointments, “to ensure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland.” The government’s hope, therefore, seems to have been that the Commission, despite being non-elected, would gain its legitimacy from being broadly representative of the community. The Commission was initially comprised of a chairman, four other commissioners, and a staff of civil servants.¹²² Although broadly welcomed within the Catholic community (despite continued suspicion of excessive police influence), it was rejected from the outset by many Unionists (including the Orange Order, who still refuse to engage with the Commission).¹²³ Indeed, the purported “representativeness” of the

The Secretary of State can ban an individual parade, or all parades in a particular area, for a period not exceeding twenty-eight days (s.11, Party Processions (NI) Act 1998). While these powers have not yet been exercised, only the fact that the Commission’s determinations are subject to independent judicial review would appear to confirm its compliance with the test of “independence and impartiality” contained in Article 6(1) of the European Convention on Human Rights (ECHR)—the right to a fair trial. There is, though, some doubt as to whether Article 6 of the ECHR applies to the adjudicatory role of the Parades Commission. See MICHAEL HAMILTON, NEIL JARMAN & DOMINIC BRYAN, *PARADES PROTESTS AND POLICING: A HUMAN RIGHTS FRAMEWORK* 35–40 (2001), available at http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/24/parades_policing.doc.

¹²⁰ Dominic Bryan, *Is the Parades Commission on the Right Route? Or Public Perceptions of a Mongrel 3* (February 22, 2000) (unpublished manuscript, on file with author).

¹²¹ *Id.* at 6.

¹²² The Commission’s first Chairman was Alistair Graham, with David Hewitt, Frank Guckian, Rev. Roy Magee, and Berna McIvor as Commissioners.

¹²³ See *Parades Policy Decision Deferred*, BBC NEWS, Feb. 18, 2006, http://news.bbc.co.uk/1/hi/northern_ireland/4724332.stm. This was despite the appointment of two Orangemen (David Burrows and Donald McKay) as Commissioners

Commission has three times been challenged in the High Court in Belfast (ironically perhaps, by Nationalist residents on each occasion).

In February 1998, the then Secretary of State, Mo Mowlam, appointed four new members—two Protestants and two Catholics. One of the Protestants was a leading member of the Apprentice Boys, and the other was best known for his role in the 1974 Loyalist workers' strike which collapsed the fledgling power-sharing executive.¹²⁴ The two Catholic appointees were a barrister and former member of the Police Authority, and a senior partner in a Belfast solicitor's practice.¹²⁵ These appointments were challenged by a resident of the lower Ormeau Road in the case of *In the Matter of an Application for Judicial Review by Jane Elizabeth Armstrong*.¹²⁶ It was argued, on behalf of the applicant, that the appointees were "non-nationalist Catholics" and thus failed to provide an adequate counterbalance to the grassroots Loyalist appointees.¹²⁷ In other words, it was suggested that the Catholic appointees were not "representative" of the (grassroots) community which they appeared to have been selected to represent. While the application was ultimately unsuccessful, the case raised the vital question of whether the term "representative" implied that the Commission should be an exact mirror-image of society on political, religious, gender, or geographical grounds. The judge held (in relation to the two Catholic appointees) that representativeness was not necessarily achieved by choosing candidates to be pitted against one another. Rather, candidates should be representative of "a

in January 2006. Donald McKay has since resigned from the Parades Commission, and David Burrows from the Orange Order.

¹²⁴ Tommy Cheevers and Glenn Barr respectively.

¹²⁵ Rose-Anne McCormick and Aidan Canavan respectively. In March 1998, the Commission published, and distributed to every household in Northern Ireland, an information leaflet entitled "*Who do they think they are?*" The leaflet outlined the main tasks of the Commission and provided background information about each of the newly appointed Commissioners. The four new appointees joined the two remaining Commissioners, David Hewitt (a solicitor, former Independent Assessor of Military Complaints and founding member of the Evangelical Contribution on Northern Ireland, ECONI) and Frank Guckian (then Director of Londonderry Chamber of Commerce and a past Chief Commissioner of the Planning Appeals Commission), and the Commission Chairman, Alistair Graham (Chief Executive of the Leeds Training and Enterprise Council, and a former trade union leader and Director of the Industrial Society).

¹²⁶ Notes from the Hearing, *In the Matter of an Application for Judicial Review by Jane Elizabeth Armstrong*, [1998] NIQB (on file with authors). This information is based on notes taken by Michael Hamilton on the 3d and 29th of April during the hearing.

¹²⁷ *Id.*

wide spectrum and broad diversity.”¹²⁸ Secondly, even if those two appointments did fail to provide an adequate counterbalance to the Loyalist appointees, that did not disqualify them from being representative of the broader community of Northern Ireland.¹²⁹

In February 2000, the appointment of an all-male Commission (with only one former member being reappointed)¹³⁰ again raised the question of “representativeness.” The appointments were challenged by a resident from the Garvaghy Road in Portadown in another judicial review hearing—*In the Matter of an Application for Judicial Review by Evelyn White*.¹³¹ In the course of this hearing, the Northern Ireland Office (NIO) argued that “the parades or marching issue is primarily an issue which engages the sectarian division within Northern Ireland. It is that division which, in a body as small as the Commission, must be the principal focus of the Secretary of State in making appointments to it.”¹³² Lord Chief Justice Carswell stated that he was “not altogether persuaded that the phrase ‘representative of the community’ . . . was intended to mean that there should be gender balance, or at least some representation of each gender in the make-up of the Commission.”¹³³ Moreover, he concluded that because it was not practicable to appoint a woman to the Commission in the circumstances, it was unnecessary to decide the question of whether the PPA imposed a requirement only to ensure sectarian balance in the composition of the Commission.

¹²⁸ Notes from the Hearing, *In the Matter of an Application for Judicial Review by Jane Elizabeth Armstrong*, [1998] NIQB. This information is based on notes taken by Michael Hamilton on the 29th of April 1998 during the hearing (on file with authors).

¹²⁹ This contradicts paragraph twenty-six of the affidavit of Mr. John Steele, in which he states: “Mrs. McCormick, together with the other member appointed, is representative of the minority part of the community in Northern Ireland.” Steele Aff. ¶ 26 (on file with the authors).

¹³⁰ William Martin was the only Commissioner to retain his post on the Commission, raising questions about the need for some level of continuity in the Commission’s membership (a point touched upon in the REPORT OF THE REVIEW OF THE PARADES COMMISSION AND PUBLIC PROCESSIONS (NI) ACT 1998, at ¶¶ 10.2(ii), 21.24 (2002) [hereinafter, THE QUIGLEY REPORT].

¹³¹ *In the Matter of an Application for Judicial Review by Evelyn White* [2000] NIQB (N. Ir.).

¹³² Watkins Aff. ¶ 17 (on file with the authors).

¹³³ *In the Matter of an Application by Evelyn White for Judicial Review* [2000] NIQB 2085 (N. Ir.).

Another judicial review was mounted against the NIO's appointment of two Orangemen to the Commission in January 2006;¹³⁴ however, like both the *Armstrong* and *White* cases, they were unsuccessful. In this hearing, Lord Chief Justice Kerr considered "that the balance dimension to representativeness on the Commission must, as a matter of practical reality, be confined to the representation of both sides of the community of Northern Ireland. To apply a requirement of balance beyond that would create an impossible hurdle."¹³⁵ Noting that the conflict of interest "is both inescapable and obvious,"¹³⁶ Kerr LCJ foresaw "considerable difficulties in Mr. Burrows taking part in many of the critical determinations of the Commission."¹³⁷ Consequently, David Burrows resigned from the Orange Order and agreed not to take part in any Parades Commission decisions relating to parades in Portadown.

The appointment of "grassroots" Loyalists in both 1998 and 2006 was an attempt by the government to assuage Unionist/Loyalist anger and so avoid another "Drumcree 1996" or "Whiterock 2005." As Larry Diamond notes, "a concrete way that institutional design can mitigate the obstacles to democratic consolidation is by discouraging politically significant groups from becoming disloyal or even equivocal in their commitment to the system."¹³⁸ However, there is clearly a potential clash between representativeness and independence—those who represent warring political identities cannot, at the same time, be viewed as truly independent. Thus, if "representative" is understood to mean directly representative of the parties to a dispute, clear conflict of interest issues arise. On this basis, we suggest that the representativeness criterion should be relegated to a secondary consideration, while greater attention should be devoted to factors which would demonstrably secure the independence of the body. That is not to say that broad representativeness on (at least) political, religious, cultural, and

¹³⁴ In the Matter of an Application by John Joseph Duffy for Judicial Review [2006] NIQB 29 (N. Ir.); see also In the Matter of an Application by John Joseph Duffy for Judicial Review [2006] NICA 28 (Civ) (N. Ir.).

¹³⁵ In the Matter of an Application by John Joseph Duffy for Judicial Review [2006] NICA 28 (Civ) (N. Ir.), Judgment of Kerr LCJ at para.17.

¹³⁶ *Id.* at para. 31. Morgan J had earlier stated in the High Court that "the notion of a body which is representative of the community in Northern Ireland encompasses not just diversity but also the concept of balance." In the Matter of an Application by John Joseph Duffy for Judicial Review [2006] NIQB 31 (Civ) (N. Ir.) at para.18.

¹³⁷ In the Matter of an Application by John Joseph Duffy for Judicial Review [2006] NICA 28 (Civ) (N. Ir.) at para.35.

¹³⁸ LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 104 (The John Hopkins University Press 1999).

gender grounds should not be encouraged, merely that, unless the balance of distaste is shared equally across the communal divide, efforts to increase grassroots representation are likely to undermine the body and distract from efforts to resolve the substantive issues. Indeed, there is little evidence from the Parades Commission case study to suggest that the institutional inclusion of antagonistic perspectives translates into greater inclusion or tolerance within the wider community. This scenario is described by Manlio Cinalli as “pillarisation”—where “majority and minority communities find full representation in the institutional framework, but only form loose ties with one another”¹³⁹ It is argued that the Parades Commission’s legitimacy ought ultimately to derive from its proficiency in decisionmaking and, more specifically, its framing of the valid interests at stake and facilitation of bargaining processes.

B. Framing and Bargaining Processes

The Commission is a hybrid body performing a dual function—issuing determinations with respect to particular proposed public processions¹⁴⁰ (the adjudication function) carried out by state-appointed commissioners and “facilitating mediation”¹⁴¹ (the mediation function) undertaken by contracted Authorized Officers (AOs). The Commission imposes (vertical/hierarchical) decisions in situations where agreed local (horizontal) accommodations between stakeholders cannot be reached (even following intervention by the AOs or other mediators). There is nothing in the PPA which prescribes how the relationship between the adjudicatory and mediative functions of the Parades Commission should work in practice, and there has long been a tension between these two elements. Moreover, these two functions have each presented different opportunities for clarifying the interests at stake and for articulating principles which might provide the basis for consensual resolution. They do not, therefore, map straightforwardly onto the procedural roles of dispute resolution outlined in Part I—first, a pre- or extra-dialogical process which frames the dispute and seeks to establish defined parameters and, second, a communicative bargaining process that takes place within

¹³⁹ Cinalli, *supra* note 9, at 178.

¹⁴⁰ See Public Processions (Northern Ireland) Act, 1998, c. 2, § 2(2)(b).

¹⁴¹ Section 2(2)(a) of the Public Processions Act provides that the Commission may “facilitate mediation between parties to particular disputes concerning proposed public processions and take such other steps as appear . . . to be appropriate for resolving such disputes.” Public Processions (Northern Ireland) Act, 1998, c. 2, § 2(2)(a).

these boundaries. It is the institutional design features that facilitate the framing of and bargaining over contested parades to which we now turn.

1. *Framing Parade Disputes*

a. *The Institutional Remit*

Parade disputes are a microcosm of Northern Ireland's wider political conflict and are intrinsically bound up with the nature of its "conflicted democracy."¹⁴² Given their totemic significance, the intensity of such disputes has reflected the prevailing political climate, and they have provided a vehicle through which other issues have been dramatized and played out. Efforts to find a resolution have thus been viewed either as contingent upon agreement on policing and political structures, or as a necessary precursor to macropolitical progress. This is typical of identity-based conflicts where it is often impossible to disaggregate the disputed issues. In turn, this leads to brinkmanship on the basis that "nothing can be agreed until everything is agreed"—a dynamic that partly explains why this intractable issue was siphoned off from the peace negotiations. However, it raises the design problem of how to frame the remit of an institution intended to respond to a particular problem. A body with a limited role might always be captive to wider political developments, while a body with a broad remit might simply become a surrogate for political negotiations writ small. On the one hand, a narrow remit can give clarity and purpose. On the other, it can lead to a false compartmentalization of the conflict. Moreover, such design decisions inevitably affect the type and scope of possible interventions.

In Northern Ireland, the parades-specific remit of the *North Review* was critiqued for being too narrow—it was argued that parades were but one manifestation of the wider question of territoriality and the issue of sharing public space.¹⁴³ Subsequently, this narrow focus presented difficulties for some of the Commission's AOs. On occasion, AOs felt unable to intervene until a specific *parades* problem arose despite the escalation of local tensions

¹⁴² See also Fionnuala Ní Aoláin & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS. Q. 172 (2005). The authors distinguish post-conflict *peace* transitions from post-revolutionary *democratic* transitions and argue that transitions in "conflicted democracies," *id.* at 176, are not characterized solely by the supersession of violence by peace, but also involve "a deepening of substantive democracy," *id.* at 179.

¹⁴³ See BRENDAN MURTAGH, COMMUNITY AND CONFLICT IN RURAL ULSTER 56 (1999).

concerning other issues around the use of public space (such as flag disputes or ongoing interface issues). This in turn created a perception amongst local community workers and other agencies that the AOs were “parachuted” into an area and that they were not sufficiently aware of local sensitivities or the nuances of other initiatives.¹⁴⁴

In addition, one of five critical success factors devised by the review team, against which they sought to test their proposals, was that “any new arrangements should lead . . . where practical, to achieving an accommodation for parades in individual locations *over a longer time frame*.”¹⁴⁵ Therefore, it was proposed that in order to improve the prospects for local agreement, the Parades Commission “should take a broad overview of the number and nature of parades in a particular area, ideally on a timescale of a year or more, rather than just considering individual parades, one at a time. The latter is a recipe for maintaining a win-lose perspective.”¹⁴⁶ The *Quigley Report* similarly recommended that the adjudicatory body should be able to impose determinations which would stand for up to five years,¹⁴⁷ but this recommendation has not been implemented—presumably because it would risk glossing over the specific interests and rights issues raised in individual situations.

If the conflict is more broadly defined, that may open up possibilities for more relevant, timely, and coordinated interventions. Equally, though, the adjudicatory function of the Commission necessarily has a narrow focus given the esoteric nature of the issues raised by public processions. If, as we suggest, institutionalized devices of framing and bargaining can shift disputants from their entrenched positions in relation to one specific issue, by doing so, such processes can spur agreement on other issues. This progressive dynamic of conflict resolution impels the modification of newly

¹⁴⁴ One possibility for reform would be for the mediative function of the Parades Commission to have a more broadly cast focus than at present, touching on other issues pertaining to shared space. As recommended in recent research conducted for the Office of the First and Deputy First Minister, there is a need to “[d]evelop a more co-ordinated approach to management of conflict and conflict transformation through the use of dedicated fieldworkers.” Dominic Bryan & Gordon Gillespie, *Transforming Conflict: Flags and Emblems*, BELFAST: INSTITUTE OF IRISH STUDIES ¶ 7.37 (2005). This could be achieved by broadening the remit of the AOs and locating them outside the Parades Commission (possibly, for example, within the Community Relations Council). This, though, would entail changes to other aspects of the Commission’s work—particularly in relation to its evidence gathering mechanisms.

¹⁴⁵ THE NORTH REPORT, *supra* note 62, at 129 (emphasis added).

¹⁴⁶ *Id.* at 160–61.

¹⁴⁷ THE QUIGLEY REPORT, *supra* note 131, at 246.

dissonant and contradictory stances, as well as providing a stable basis for expanding relations of recognition between disputants.¹⁴⁸ The example of the Parades Commission—as we discuss further below—clearly evidences the potential for an institution with a narrowly framed remit to incentivize broader processes of democratic consolidation.

b. Participation and Procedural Transparency

Acknowledging past structural deficiencies, the *North Report* critiqued the police regulation of parade disputes on the basis that there was “no explicit opportunity for the consideration of the views of local residents, other than through the threat of protest.”¹⁴⁹ Drawing upon the arrangements for dealing with contentious parades in South Africa (emphasizing the importance of wide involvement and prior negotiations),¹⁵⁰ the report recommended that the Commission “should be free to take such steps as it thinks appropriate to obtain the views of all interested parties.”¹⁵¹ While arguing that there may be occasions when the Commission felt it necessary to obtain views in confidence (because “intimidation and community pressures are realities in Northern Ireland”),¹⁵² the review team left open the possibility that the “Commission may, however, wish to have more than one group present at the same time, thereby allowing interested parties to hear the points others are making, both in order to understand their position better and to be able to take their views into account.”¹⁵³

The review team also argued that “a Code of Conduct should be introduced covering the behavior of both participants in a parade and of protesters” for this “would buttress the right to peaceful assembly and evidence respect for the views of others.”¹⁵⁴ Given that “a code is of little value if it is not applied,”¹⁵⁵ the *North Report* recommended that the Parades Commission “should be required to address the question of monitors,”¹⁵⁶ and that in considering any parade proposal, the Commission should have regard

¹⁴⁸ See AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* 170 (1995).

¹⁴⁹ THE NORTH REPORT, *supra* note 62, at 134.

¹⁵⁰ *Id.* at 106–07.

¹⁵¹ *Id.* at 159.

¹⁵² *Id.* at 160.

¹⁵³ *Id.*

¹⁵⁴ THE NORTH REPORT, *supra* note 62, at 181.

¹⁵⁵ *Id.* at 187.

¹⁵⁶ *Id.* at 187.

for “any evidence of previous breaches of the Commission’s or of an approved Code of Conduct, whether by participants or protesters.”¹⁵⁷

The Commission has largely followed these recommendations. Interested parties to specific disputes (including the police) are invited to meet with the Commission to explain their concerns and discuss the options available. Furthermore, the internal review procedures (under paragraph 6 of the *Procedural Rules*)¹⁵⁸ provide a forum for parties to correct any factual inaccuracies in a Commission determination or to present new evidence that might merit the Commission’s reconsideration of an earlier decision. In addition, a team of approximately thirty volunteer monitors have been recruited and trained, and these monitors submit factual reports to the Commission about parades they have observed. Importantly, the Commission also receives reports from its team of twelve AOs. AOs are self-employed (i.e., they are not employees of the Commission but are paid by the Commission) and work in teams of two (balanced, where possible, in terms of gender and religion) in designated areas across Northern Ireland. Their main responsibilities are:

- (a) gathering information about parades and the areas in which they are held and reporting to the Commission accordingly;
- (b) making contact and building relationships with local groups and individuals, including parade organisers and residents’ associations;
- (c) helping the Commission to communicate with specified parties by disseminating information from the Commission, including, where appropriate, serving determinations in respect of particular parades;
- (d) taking steps to secure local accommodation in relation to parade disputes, including the more long term approach of community development which seeks to promote and support community activity to build the potential for local accommodation;
- (e) reporting to the Commission the potential for such accommodation;
- (f) engaging with community groups in an educational process about the Parades Commission, how it operates, the extent of its powers and decision making process;
- (g) reporting to the Commission in the aftermath of contentious parades on how the parade was conducted. The AOs’ report informs the Commission’s future decisions on that parade in relation to

¹⁵⁷ *Id.* at 188.

¹⁵⁸ PARADES COMM’N, PROCEDURAL RULES ¶ 6 (2005) available at, <http://www.paradescommission.org/publications/PDF/AC440D.pdf>.

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compliance with the conditions of any determination issued in relation to it, and with its Code of Conduct.¹⁵⁹

The Commission's *Procedural Rules* provide that the AOs will act on the Commission's behalf in gathering information,¹⁶⁰ will be party to confidential evidence,¹⁶¹ and will also report to the Commission on the potential for achieving local accommodation "and on any steps taken towards securing accommodation by the parties to a dispute."¹⁶² Their reports might outline a number of options for the Commission to consider. Indeed, AOs are sometimes invited (or may themselves request an opportunity) to brief commissioners on recent and potential developments in particular locations. They do not, however, sit in on Commission meetings.

It has been argued that the Commission would become detached if it were not party to the flow of information provided by the AOs. The Northern Ireland Affairs Committee, for example, stated that one role of the AOs was to provide "an essential conduit of information between the two communities and the Parades Commission" without which "the work of the Commission would be seriously impaired."¹⁶³ Indeed, it "is difficult to see how the Parades Commission could be properly informed in the absence of the reports of the Authorised Officers."¹⁶⁴

As will become clear when we discuss the bargaining processes enabled by the Commission (below), this reporting function of the AOs does compromise their ability to mediate disputes. There have also been some accusations that the Parades Commission is a "factory of grievances,"¹⁶⁵ and despite these multiple channels, the Commission has sometimes been criticized for existing in an "ivory tower."¹⁶⁶ Nonetheless, we believe that it largely conforms to Goodin's reflective model of institutional responsiveness where the inclusivity and quality of inputs matters, and parties' arguments

¹⁵⁹ PARADES COMM'N SECOND ANN. REP. 1999–2000, at 21–22 (2000).

¹⁶⁰ PARADES COMM'N PROCEDURAL RULES ¶ 2.2 (2002).

¹⁶¹ *Id.* ¶ 3.3.

¹⁶² *Id.* ¶ 4.3.

¹⁶³ See N. IR. AFFAIRS COMM., THE PARADES COMMISSION AND PUBLIC PROCESSIONS (NORTHERN IRELAND) ACT, 1998, H.C. 172-I, ¶ 80 (2005).

¹⁶⁴ *Id.* ¶ 76, at 26.

¹⁶⁵ Memorandum submitted by the Independent Loyal Orange Institution, in N. IR. AFFAIRS COMM., THE PARADES COMMISSION, H.C. 120-II, Appendix 2 at 190, 191 (2000–01).

¹⁶⁶ N. IR. AFFAIRS COMM., THE PARADES COMMISSION AND PUBLIC PROCESSIONS (NORTHERN IRELAND) ACT 1998, 2004–5, H.C. 172-II (Oral and Written Evidence) at Ev. 23, Answer by Mr Alistair Simpson to Q.80 (Mr Luke).

and reasons are explored rather than merely their “bottom line.”¹⁶⁷ There is, however, some room for improvement. One important aspect of the prediallogic process which has arguably been frustrated by the Commission’s procedures is the free-flow of information between parties—in other words, the degree to which parties are informed of other parties’ concerns or objections. Rule 3.3 of the Commission’s *Procedural Rules* states:

*All evidence provided to the Commission, both oral and written, will be treated as confidential and only for the use of the Commission, those employed by the Commission and Authorised Officers. The Commission, however, reserves the right to express unattributed general views heard in evidence [but only as part of an explanation of its decision].*¹⁶⁸

This rule has proved to be a substantial obstacle in promoting a truly communicative approach in the operation of the Commission.¹⁶⁹ There is a strong argument that by making all representations to the Commission available to all parties, disingenuous or fallacious representations would be discouraged. If disclosure might pose a safety risk to individuals, summaries of representations might instead be published, omitting any details that could identify the source of the information. Improving transparency in this way would have one of two consequences. It could serve to “out” indefensible arguments, whereupon parties would be subject to ridicule or criticism. Alternatively, parties might attempt to preempt potential criticism by “window-dressing” their arguments so as to give an appearance of reasonableness. As Habermas notes, “concealing publicly indefensible interests behind pretended moral or ethical reasons necessitates self-bindings that either on the next occasion expose a proponent as inconsistent or, in the interest of maintaining his credibility, lead to the inclusion of others’ interests.”¹⁷⁰ Edward Weisband similarly envisages parties becoming “entrapped in a process of ‘self-hostaging’ on the basis that “[s]hame exists

¹⁶⁷ GOODIN, *supra* note 14, at 16.

¹⁶⁸ PARADES COMM’N, PROCEDURAL RULES ¶ 3.3 (2005) (emphasis added).

¹⁶⁹ The principles governing discovery of confidential documents in the course of judicial review proceedings—where proportionality is in issue in the substantive application—are the subject of *Tweed v. Parades Commission for Northern Ireland* (presented to the House of Lords on December 12, 2005 and set for hearing on March 6, 2006; judgment awaited). This is an appeal from *In the Matter of An Application by David Tweed on his own behalf and on behalf of all other Members of Dunloy LOL 496*, for Judicial Review [2005] NICA 42 (Civ) (N. Ir.).

¹⁷⁰ HABERMAS, *supra* note 2, at 340.

in a world of honor, even if it is honor among thieves.”¹⁷¹ While parties might not always be concerned about their public image or reputation, in identity-based conflict, parties rarely want to be perceived as the spoilers. This is particularly so where the dynamics and outcomes of individual disputes can affect the bargaining strengths of the broader constituencies (Loyalist or Republican) in the political process. Thus, while “taking the moral high-ground” may be a euphemism for one party attempting to prove itself better than the other, procedural transparency can serve to create a de-escalatory spiral in which parties compete to demonstrate their bona fides. Moreover, when parties do hear the objections raised by others, they are then in a position to address or challenge the concerns raised. This advances the prospect for resolution in local situations, ultimately reducing the number of determinations which the Commission need issue.

c. *Community Relations and Human Rights* *Conceptualizing the Conflict*

The Parades Commission is a laudable attempt to think through one of Northern Ireland’s toughest public order issues; it is also an “interesting prototype” for public order decision making more generally. However, the Commission will still need to address the question of why freedom of assembly “is valued and the role and function it plays, or should play, in Northern Ireland,” in particular “how should freedom of assembly be defined and applied in order to bring about a more tolerant society based on equality and parity of esteem.”¹⁷²

As we have suggested, both the institutional remit and the procedures adopted by the Commission impact the way in which the conflict is framed. Just as importantly, though, is the way in which the institution itself conceives of the dispute and articulates its core principles. Furthermore, as Stulberg notes, “[p]rovisions of positive law are often relevant to shaping the conversation and visions regarding what parties want or are willing to agree to in negotiation.”¹⁷³ In this light, the *North Report* stressed “the need for

¹⁷¹ Edward Weisband, *Verdictive Discourses, Shame and Judicialization in Pursuit of Freedom of Association Rights*, in *THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW* 134, 138 (Saladin Meckled-Garcia & Basak Cali eds., 2006).

¹⁷² NOEL WHITTY, THÉRÈSE MURPHY & STEPHEN LIVINGSTONE, *CIVIL LIBERTIES LAW: THE HUMAN RIGHTS ACT ERA* 92 (2001). This echoes the point made by Imelda McAuley. See McAuley *supra* note 38 at 55.

¹⁷³ See Stulberg, *supra* note 15, at 538.

statutory criteria which take a clearer account of the underlying rights and responsibilities of all concerned”¹⁷⁴ and recommended that the criteria themselves should be extended to include consideration of the “impact of the parade on the relationships within the community.”¹⁷⁵ The PPA thus extended the previous statutory criteria for determining whether conditions should be imposed on a parade, and Section 8(6) of the PPA represents an attempt to move away from decisions based solely on public order grounds. It provides that the Commission shall have regard to:

- (a) any public disorder or damage to property which may result from the procession;
- (b) any disruption to the life of the community which the procession may cause;
- (c) any impact which the procession may have on relationships within the community;
- (d) any failure of a person of a description specified in the guidelines to comply with the Code of Conduct...; and
- (e) the desirability of allowing a procession customarily held along a particular route to be held along that route.¹⁷⁶

Casting the parades conflict more emphatically in terms of its potential to undermine community relations was itself an acknowledgement that there are legitimate interests at stake for each of the parties—recognition that it is not a straightforward policing or public order issue. Moreover, it sought to remind parties of the overarching and shared interest in improved inter-communal relations. However, by introducing such broadly defined harms—less amenable to assessment or measurement—the statutory framework has arguably compromised the ability of the Commission to “clarify the public interest.” Criticizing this aspect of the *North Report*, Professor Tom Hadden argued that “whoever is making decisions should be making those decisions on the basis of a statutory code. There are some parts of North which appear to suggest a much more discretionary decision on the part of the [C]ommission.”¹⁷⁷ Subsequently, the Northern Ireland Community Relations Council has been critical of the Commission’s application of the criterion:

¹⁷⁴ THE NORTH REPORT, *supra* note 62, at 135; *see also id.* at 54 (discussing concerns raised about the statutory criteria laid out by the RUC).

¹⁷⁵ *Id.* at 158.

¹⁷⁶ Public Processions (Northern Ireland) Act, 1998, c. 2, § 8(6).

¹⁷⁷ 2 N. IR. FORUM FOR POLITICAL DIALOGUE, REVIEW OF THE PARADES ISSUE IN NORTHERN IRELAND 395 (1997), http://www.ni-forum.gov.uk/reports/cr9_v2.pdf (referring to statements of Professor T. Hadden and Ms. A. Donnelly).

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“[T]here is no indication of how [the impact of a parade on community relations] is monitored, either before or after the event, so that outcomes can inform future decisions. Nor is there any indication of a base line used in the setting of judgments.”¹⁷⁸

Not only has there been a failure to establish benchmarks against which the impact of a parade on community relations might be assessed, the Commission’s determinations have also failed to clearly enunciate the boundaries of the human rights claims made by the parties. Despite the conclusions of an internal NIO review of the Commission, that “acceptance of the Commission’s determinations could be further improved if the reasoning behind them were set out in more detail,”¹⁷⁹ determinations simply note that it is “from the perspective of the parade organiser” that “the Convention rights engaged are those protected by Articles 9, and 10 and, in particular, Article 11.”¹⁸⁰ Determinations also routinely state that “[t]hose who live, work, shop, trade and carry on business in the affected locality enjoy rights under Article 8 of the Convention and Article 1 of the First Protocol thereto.”¹⁸¹ No further attempt is made to assess the implications of these rights in the particular situation, to rule on the validity of the parties’ rights claims, or to explain how any restrictions imposed either relate to or address the rights issues raised. While the Commission’s determinations arguably comply with the European Convention on Human Rights (ECHR),¹⁸² they do so largely because the ECHR jurisprudence itself permits a relatively wide “margin of appreciation” as to how signatory States fulfill their Convention obligations (an issue which we discuss in greater detail

¹⁷⁸ See SUBMISSION TO THE NORTHERN IRELAND OFFICE ON THE REVIEW OF THE PARADES COMMISSION FROM COMMUNITY RELATIONS COUNCIL, in N. IR. AFFAIRS COMM., THE PARADES COMMISSION, H.C. 120-II, at 210 (2000–01).

¹⁷⁹ *Id.* at 86.

¹⁸⁰ See, e.g., PARADES COMM’N, DETERMINATION IN RELATION TO THE BALLYMACARRETT DISTRICT LOL NO. 6 PARADE NOTIFIED TO TAKE PLACE IN BELFAST ON SUNDAY 29 OCTOBER 2006 at para. 11, available at <http://www.paradescommission.org/parades/>.

¹⁸¹ *Id.* at para.12. Keir Starmer and Jane Gordon provide a similarly anodyne account of the rights potentially engaged in their REPORT ON THE POLICING OF THE 12TH JULY ARDOYNE PARADES ¶ 10 (2004), available at http://www.nipolicingboard.org.uk/word_docs/PDFs/ardoyne_parades.pdf.

¹⁸² The decisions of all public authorities must comply with the *Human Rights Act* 1998 which incorporated the ECHR into domestic law, and which came into force in October 2000.

elsewhere).¹⁸³ Against this backdrop, the timidity of the Parades Commission in not explicitly ruling on the validity of the parties' rights claims¹⁸⁴ allows the vocabulary of rights to be used rhetorically in defense of entrenched positions. The Commission has not therefore maximized the utility of a rights discourse to frame parade disputes in such a way as to level the playing field and render disputants more amenable to the procedural devices of communicative action. Any bargaining processes built on this imperfect pre-dialogic groundwork are disadvantaged as a result. As Michelle Parlevliet argues: "Conflict management must take place within a framework in which human rights are nonnegotiable. While there is much scope for dialogue, negotiation, and accommodation within that framework, practitioners must be aware of its parameters in order to ensure that their interventions are in line with fundamental rights and freedoms."¹⁸⁵

Ostensibly, this constructed model of dialogue challenges the classic mediation paradigm in which parties themselves decide the issues and set the agenda. In actuality, though, it is not that far removed from the elicitive model. The framing process implicitly draws upon the representations that parties themselves make to the Commission. Its aim is simply to settle background issues and establish a minimum consensus (with reference to external norms such as international human rights law) and thus focus parties on, and ensure a common understanding of, the core political problem. This pre- or extra-dialogical process is necessary given Rosenfeld's argument (in Part I above) that parties sometimes hold such incompatible perspectives that they are likely to be resistant to the procedural devices of communicative action.¹⁸⁶ In order for dispute resolution mechanisms to serve a triangulating role in democratic consolidation (mediating between state institutions/public policy and underlying cultural values), we suggest that bargaining processes must first agree on the margins of the conflict. This framing can equalize bargaining positions and ensure a common starting point, yet it leaves open much scope for dialogue about how best to resolve the contested issue. As Parlevliet states, "whereas basic human needs are not negotiable, the possible

¹⁸³ See MICHAEL HAMILTON, NEIL JARMAN & DOMINIC BRYAN, PARADES, PROTESTS AND POLICING: A HUMAN RIGHTS FRAMEWORK 19–20 (2001), available at http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/24/parades_policing.doc.

¹⁸⁴ For example, in relation to what constitutes "peaceful assembly" or in relation to the precise circumstances when "the right to private and family life" would actually be engaged on the part of local residents in the vicinity of a parade.

¹⁸⁵ Michelle Parlevliet, *Bridging the Divide: Exploring the Relationship Between Human Rights and Conflict Management*, 11:1 TRACK TWO (2002), available at http://ccrweb.ccr.uct.ac.za/archive/two/11_1/bridging.html.

¹⁸⁶ See discussion *supra* Part I.

satisfiers are, and these will vary depending on the context Similarly, fundamental rights and freedoms are not negotiable, but the manner in which they are recognised is indeed negotiable.”¹⁸⁷ We suggested at the outset that institutional design decisions could affect whether parties engaged communicatively or merely strategically. The following section examines the mechanisms instituted to provide opportunities for parties to parade disputes to generate “possible satisfiers,” critiquing them against this Habermasian standard of ideal communication.

2. *Bargaining Processes*

Despite the fact that direct dialogue between parties to parade disputes has occurred in very few situations, the Parades Commission has attached great weight to the concept of “engagement.”¹⁸⁸ Examination of this concept illustrates the crossover between the two functions of the Commission (adjudicative and mediative) and demonstrates both the benefits and drawbacks of the Commission’s hybrid design. In this section, we look more closely at what the Commission means by engagement, how the Commission has sought to bring about communicative dialogue through the work of the AOs, and the implications of the AOs being linked to the adjudicatory body for deepening democratic dialogue.

a. *Engagement*

In the surveys conducted for the North Review, an overwhelming eighty-eight percent of respondents agreed that negotiated accommodation should be sought where there was a dispute between marchers and residents.¹⁸⁹ The North Review Team therefore attached a premium to the value of local negotiations, assisted, if appropriate, by third party mediators.¹⁹⁰ Since its

¹⁸⁷ Parlevliet *supra* note 85 (citing M.A. MAX-NEEF, ANTONIO ELIZALDE & MARTIN HOPENHAYN, HUMAN SCALE DEVELOPMENT: CONCEPTION, APPLICATION AND FURTHER REFLECTIONS 16–28 (1991)). Jeremy Waldron similarly states that “[i]nterests are complicated things. There are many ways in which a given interest can be served or disserved, and we should not expect to find that only *one* of those ways is singled out and made the subject matter of a duty.” JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 212 (1993) (emphasis in original).

¹⁸⁸ PARADES COMM’N SECOND ANNUAL REPORT 1999–2000, at 15–16 (2000).

¹⁸⁹ NORTH REPORT *supra* note 62 at 82.

¹⁹⁰ *Id.* at 82 (Noting that “[t]here was broad agreement between Catholic and Protestant respondents, 97% of Catholics and 83% of Protestants agreeing that negotiated accommodation should be sought in such circumstances.”) The North Report identified

inception, the Parades Commission has sought to encourage local agreements so that, ultimately, no determinations need be issued. To this end, the concept of engagement has occupied center stage in its assessment of the impact of a parade on community relations:

We measure the impact [on relationships within the community] through assessing whether there has been a genuine attempt to gain the respect of the receiving community for such a parade through seeking dialogue where views can be exchanged and any concerns about a parade can be aired. The Commission has acknowledged that in some areas such dialogue is problematic and it has therefore encouraged all the parties to spare no effort in finding a mutually acceptable form of communication. The Commission has described this process of dialogue as engagement and it has stressed that, in proposing engagement to address legitimate concerns about a parade or parades in a particular locality, it makes a distinction between engaging and seeking permission. Engagement by either part represents a real attempt to address the legitimate concerns of others, and a preparedness to accommodate those concerns, where it is within their power to do so.¹⁹¹

Following requests for clearer guidance on what constitutes engagement, the Commission outlined a number of additional “pointers”:

Dialogue alone is not sufficient to demonstrate “engagement.” Dialogue must be sustained, substantive and genuine if it is to bear fruit In genuine engagement, each party can be expected to:

- enter the process with no pre-conceived outcomes,
- listen to and try to understand the other’s concerns,
- show respect to the other, by taking their concerns seriously,

five “key elements” which would ideally be present whenever mediation is being considered: (1) a willingness between the parties concerned to communicate with each other, either directly or indirectly; (2) the opportunity to start the process early; since trust is a vital ingredient, beginning mediation and negotiations at the 11th hour is not the best way to proceed; (3) being prepared to devote sufficient time to the process, so that all parties understand each other’s position; (4) a willingness, not just to enter into discussion, but also to reach a mutually agreed outcome; and (5) an ability, on the part of the parties concerned, to speak with some authority on behalf of their respective groups in the community. *Id.* at 143.

¹⁹¹ MEMORANDUM SUBMITTED BY THE PARADES COMMISSION, *in* NORTHERN IRELAND AFFAIRS COMMITTEE, SECOND REPORT: THE PARADES COMMISSION, H.C. 120-II, at 3 (2000–01), available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmniaf/463/0050303.htm>.

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- be willing to communicate their own legitimate concerns clearly,
- focus on issues that are capable of being addressed by the parties concerned,
- demonstrate a commitment to resolving the problem and addressing legitimate concerns, preferably within a target timetable,
- be represented by people with the authority to speak for the protagonists, and
- demonstrate a willingness to consider some form of third party intervention, such as mediation, if direct dialogue is not possible.¹⁹²

The Commission has linked the failure to engage with the rights issues at stake—the fact that no engagement had taken place “may have negative consequences in the context of the considerations which the Commission is obliged to take into account and the various rights and interests at play.”¹⁹³ The Commission has also stated that dialogue is crucial in building “towards a position of respect and thus . . . towards embracing the diversity which we all value.”¹⁹⁴ Yet the failure of the Commission to frame the rights issues leaves these notions of respect and diversity afloat, compromising the potential for engagement to cut to the nub of the dispute. Indeed, the concept of “engagement” has proved extremely problematic. In some areas, it appears to have been elevated into a precondition for future parades,¹⁹⁵ and the *Quigley Report* in 2002 pointed to the fact “that . . . nearly 6 years on, there are still situations where there is no real engagement.”¹⁹⁶ The report argued that:

¹⁹² PARADES COMM’N *supra* note 189.

¹⁹³ Parades Comm’n, Belfast Walker Club ABOD Parade in Belfast (Apr. 1, 2002) (unpublished determination, on file with authors).

¹⁹⁴ Parades Comm’n, Belfast Walker Club ABOD Parade in Belfast (Nov. 9, 2002) (unpublished determination, on file with authors).

¹⁹⁵ The situation in the town of Dunloy perhaps provides the starkest example. *See also* KELLY & NAN, *supra* note 55, at 35; Parades Comm’n, Consideration of Contentious Parades and Determination Regarding Dunloy Apprentice Boys Church Parade (May 17, 1998) (unpublished determination, on file with authors); In the Matter of an Application by David Tweed on his own Behalf and on Behalf of all Other Members of Dunloy LOL 496 for Judicial Review [2005] NICA 42 (Civ) (N. Ir.). In addition to challenging the proportionality of the restrictions contained in the Commission’s determinations of April 5 and 9, 2004, the applicant is seeking a declaration of incompatibility in respect of Section 8(6)(c) of the PPA (the community relations criterion) on the basis that this is not a legitimate aim in Articles 9, 10, and 11 of the ECHR for which restrictions on these convention rights (freedom of thought, conscience and religion; expression; and assembly respectively) can be imposed.

¹⁹⁶ THE QUIGLEY REPORT, *supra* note 131, at 145.

- More could be done to explain why so much importance is attached to engagement.¹⁹⁷
- More could be done to demonstrate what it is believed is being achieved by engagement and thereby encourage increased effort.¹⁹⁸
- Given the charge of inconsistency . . . the Commission might also have made clearer how it applies the engagement factor and why . . . the weight it has given to it or to particular manifestations of engagement may have differed from case to case.¹⁹⁹

A perception exists that the Parades Commission continually moves the goalposts of engagement, and that the Commission views unilateral discussions between one party and its AOs merely as a precursor to mediated and direct dialogue between the parties.²⁰⁰ This can create a chill factor—belief that it might be better not to enter into discussions at all than to risk either the negative connotations of later withdrawal or being pressured into reaching a (strategically) unfavorable agreement. We suggest, therefore, that where a party is reluctant to enter into a process of mediation, unilateral discussions with the determining body might well be able to successfully address and resolve many of the contentious issues (for example, by securing commitments to improve stewarding arrangements at a parade). It should therefore be emphasized that unilateral discussions need not necessarily be a precursor to mediated dialogue between parties. Indeed, in some instances, mediation might not be appropriate at all.

b. The Role of the Commission in Facilitating Mediation

As the Commission has argued, however, “the most basic form of human respect is to be prepared to talk to someone.”²⁰¹ Unilateral discussions with the adjudicatory body cannot bring about expanded relations of recognition and truly communicative dialogue with democracy deepening effects. In

¹⁹⁷ *Id.* at 150.

¹⁹⁸ *Id.* at 150–51.

¹⁹⁹ *Id.* at 151.

²⁰⁰ *See, e.g.*, In re McRoberts, No. WEAB4546T (NIQB, July 11, 2003) (N. Ir.) (on file with authors). In this case, Counsel for the Commission argued that meetings between a parade organizer and representatives of the Commission (Sept.–Dec. 2002) were a precursor to engagement with residents and so could legitimately be viewed as constituting engagement. *Id.* Counsel for the applicant, on the other hand, argued that such unilateral meetings at a strategic level were “neither here nor there” and could not possibly constitute engagement. *Id.*

²⁰¹ PARADES COMM, FOURTH ANNUAL REPORT 2001–2002, at 14 (2002).

relation to the design considerations that would best promote such dialogue, the *North Report* argued that it was doubtful “whether the Parades Commission itself would need to develop a professional mediation capability amongst its own staff. Rather it should develop a register of groups and individuals with expertise who can play a part in local discussions.”²⁰² The PPA thus states that the Commission has a duty to “facilitate mediation.”²⁰³ While we have already detailed the role of the AOs in gathering evidence, the AOs also perform this key function of facilitating mediation. In the words of one government minister, they are to “discharge the function of mediation and get as closely engaged with the process as possible.”²⁰⁴ This role has been invented over time as much as it has been designed. The AOs became increasingly involved with negotiations immediately prior to, and during, parades.²⁰⁵ This became particularly important since many residents’ groups refused to deal directly with the police. In turn, the more the police began to understand the position of the AOs, the more they realized that working with them could assist in tactical de-escalatory decisionmaking on the ground. That said, the ability of the AOs to undertake this role has been very much dependent upon the particular situation and both the intervention techniques of, and confidences in, individual AOs.

Having to negotiate impending crises and deal with short-term obstacles has meant that the work of the AOs has, for the most part, been limited to capacity-building with individual parties. The hope has been that this may lead to later agreement between parties to enter into a process of mediation.

²⁰² THE NORTH REPORT, *supra* note 62, at 144. Contrary to this advice, however, the Northern Ireland Office advocated that the power to mediate should be retained by the commissioners themselves as a residual power, irrespective of whether or not it was actually used. The Public Processions (Northern Ireland) Bill, Clause 2(2)(a) provided that the Parades Commission may “mediate, or facilitate mediation . . .” See also 305 PARL. DEB., H.C. (6th ser.) (1998) 1151, 1163 (arguing that the Parades Commission should have power to mediate); HANSARD: HOUSE OF LORDS STANDING COMMITTEE B, DEBATE ON ‘FUNCTIONS OF THE COMMISSION’, 3d Sitting 75 (Jan. 20, 1998), available at <http://www.publications.parliament.uk/pa/cm199798/cmstand/b/st980120/am/80120s01.htm>. During the 1997 “marching season,” the newly appointed (but still non-adjudicatory) Parades Commissioners were involved in mediation efforts in a number of contentious locations including Bellaghy, see KELLY & NAN, *supra* note 68, at 33; Derry/Londonderry, *id.* at 59–60; and Newtownbutler, *id.* at 46–48. The Revd. Roy Magee’s involvement in Newtownbutler culminated in a historic joint statement on July 11 signed by members of the Orange Order and Newtownbutler Area Residents’ Association. *Id.* at 47.

²⁰³ Public Processions (Northern Ireland) Act, 1998, c.2, at § 2(1)(b).

²⁰⁴ 305 PARL. DEB., H.C. (6th ser.) (1998) 1163.

²⁰⁵ This material draws upon confidential interviews conducted by the authors.

The focus of the intervention, though, is on preparing the ground for such long-term initiatives (in which the AOs themselves may have little direct involvement). Consequently, the bulk of the work currently undertaken by the AOs falls within the pre-dialogical category, and the existing mechanisms for facilitating mediation have been more successful at enabling short-term “fire-fighting” than at stimulating lasting local accommodation. This weakness is reflected in the NIO’s consultation on mediation measures for parades, which states that the focus must now be shifted toward “how best to facilitate mediation to achieve long term solutions.”²⁰⁶ While the pre-dialogic role is important in its own right, we suggest that the full potential of the AO role has been undermined by its links to the adjudicatory body. This linkage has had implications for both the neutrality of the AOs and the confidentiality of the bargaining process, which we discuss briefly below.

c. Neutrality and Confidentiality

One marker of intervener effectiveness, identified by Cohen and Deason, is provided by the intervener’s neutrality or the leverage they exert on a process.²⁰⁷ It is significant that the AOs are not classed as employees of the Parades Commission, but are rather self-employed (and were originally managed by *Mediation Network*).²⁰⁸ Nonetheless, as we detailed earlier, the AOs also act as evidence-gatherers, which inevitably creates a conflict of interest with their role in facilitating mediation. Indeed, the AO’s role has developed in a way not envisaged by the *North Report*, which concluded that:

[I]t would not be right to recommend that, as a matter of course, mediators should report to the Parades Commission on the progress of local discussions, as they could then be seen as an arm of the Parades Commission and thus lose effectiveness. They should, however, report success or failure within a set timescale.²⁰⁹

In defense of the connection between the AOs and the Commission, it could be argued that unless parties believe that they can influence the

²⁰⁶ Ian Pearson, *Foreword* to NORTHERN IRELAND OFFICE, *MEDIATION MEASURES FOR PARADES IN NORTHERN IRELAND: A CONSULTATION DOCUMENT 3* (2005).

²⁰⁷ Cohen & Deason, *supra* note 3, at 30.

²⁰⁸ Now Mediation Northern Ireland, *supra* note 64; *see also* PARADES COMM’N, *FIFTH ANNUAL REPORT 6* (2002–03), *available at* <http://cain.ulst.ac.uk/issues/parade/pc/pc190903ar.pdf>.

²⁰⁹ THE NORTH REPORT, *supra* note 62, at 144.

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outcome of the Commission's determination, they will perceive there to be no benefit to engaging with the AOs, and will therefore not do so. On this view, having AOs who report to the Commission provides an otherwise absent incentive to engage. It also enhances the possibility of the Commission arriving at a determination which is sensitive to the parties' real interests. Without doubt, there have been instances where communication between community workers, representatives of marching organizations and the AOs has been instrumental in "negotiating" the particular restrictions imposed by a Commission determination. Although the AOs may have been unable to facilitate an agreement in a particular dispute, their closeness to the situation on the ground has often allowed them to make pragmatic suggestions to the Commission as to what restrictions:

- might, at least, be accepted by the parties even if they would never *publicly* agree to such a compromise,
- what restrictions are likely to be the easiest to police, and
- what restrictions might increase the likelihood of an accommodation being reached in the future?²¹⁰

Indeed, determinations sometimes give effect to "done deals." More often than not these deals have not been explicitly acknowledged in the determination. In such cases, the determination essentially provides cover for those who negotiated the deal, and who, by doing so, may have rendered themselves vulnerable to attack from "hardliners" within their own community. This may have been what Sir George Quigley had in mind when he noted "the murky world of shadows in which the Authorised Officers have to operate and by the labyrinthine complexity of the process."²¹¹ However, this (apparently pragmatic) approach which relies on open lines of communication between the mediative and adjudicatory branches of the Commission, may ultimately stymie the capacity of the Commission to deepen democratic dialogue. So long as private agreements are disguised as determinations, they are less likely to become "normative referents which shape the interpretation of bargaining strategies and future conduct."²¹² It is only when accommodations are openly acknowledged *as* accommodations

²¹⁰ This material draws upon confidential interviews conducted by the authors.

²¹¹ THE QUIGLEY REPORT, *supra* note 131, at 144. Sir George went on to remark that he had "been impressed by their 'feel' for local situations, the skill, ingenuity and tenacity they bring to problem-solving and their complete dedication." *Id.*

²¹² Linda Mulcahy, *The Devil and the Deep Blue Sea? A Critique of the Ability of Community Mediation to Suppress and Facilitate Participation in Civil Life*, 27 J.L. Soc'y 133, 146 (2000).

that they can extrapolate to the wider community the positive experience of inter-communal contact.

There are four further arguments against having the AOs report to the Commission on any substantive discussions between disputants. First, it leads to parties "talking to the Commission" through the AOs, rather than genuinely searching for agreed long-term outcomes with one another.²¹³ When parties engage simply to curry favor with the determining body, the end goal remains to influence an imposed determination rather than to set about reaching a lasting agreement. In terms of Habermasian communicative action, parties remain engaged strategically rather than communicatively.²¹⁴ As Joseph Stulberg argues, the danger is that such mediation will never be taken seriously in its own right, being instead viewed merely as "a dress rehearsal for trial."²¹⁵

Second, for the Commission, this translates into the problem of how to take a decision before any facilitated process has run its course, and what weight, if any, to place on exploratory or uncompleted talks. Often a decision must be (vertically) imposed before any dialogic process has had the chance to take root, let alone deliver local agreement, but the Commission's determinations have the potential to destabilize or undermine ongoing (horizontal) consensus-based processes. These cases are instances of what Goodin terms "arrested convergence"—"we often have to take some joint action well before information-pooling processes have played themselves out."²¹⁶ The Commission has many times been faced with the dilemma of having to decide at some point before or during a process of engagement whether one or the other party has "done enough" to get "their way." Commissioners have had to make a judgment on, for example, whether other factors should trump the fact that no engagement has occurred,²¹⁷ the

²¹³ Indeed, there have been occasions in the past when the AOs have simply been bypassed by parties who felt it more efficacious to speak directly to the Secretariat (who were perceived as having greater leverage with the Commissioners).

²¹⁴ THEORY OF COMMUNICATIVE ACTION, *supra* note 18.

²¹⁵ Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 935 (1998).

²¹⁶ GOODIN, *supra* note 14, at 79.

²¹⁷ See, e.g., *Parades Comm'n, Belfast Walker Club ABOD Parade in Belfast* (Apr. 13, 1998) (unpublished determination, on file with authors) in which the Commission stated that "some degree of time and a considerable degree of effort on the part of each of the loyal orders concerned and on the part of local people" would be required before a parade could take place in a peaceful atmosphere along the lower Ormeau Road. This principle, however, was effectively nullified by the Commission's decision two months later to allow a parade on July 13, despite no engagement having occurred. *Parades*

sufficiency of unilateral steps taken by a parade organizer,²¹⁸ a declared willingness to enter into dialogue in the future,²¹⁹ dialogue which does not culminate in agreement,²²⁰ and dialogue from which one party withdraws for purportedly extraneous reasons.²²¹ When participation in a mediation process is seen to be “rewarded,” parties are likely to enter a process only with a view to outdoing others in a box-ticking exercise, and the outcome can only be dissatisfaction on one side or the other. We suggest that only by separating the two functions can the horizontal pre-dialogic work become less susceptible to the impact of an unwelcome ruling from the Commission.

Third, as the above two arguments suggest, “encouraging” or “incentivizing” mediation can easily distort the motives of parties. The view of mediation implicit in this approach departs from the principle that mediation should be voluntary. It falls far short of the “willingness . . . to reach a mutually agreed outcome,” which the *North Report* identified as a prerequisite for the initiation of a mediation process.²²² Finally, the absence of a “Chinese wall” between the AO’s facilitation work and the commissioner’s adjudicatory function, tarnishes the concept of mediation and discourages recourse to it as a tool of dispute resolution.²²³ Parties to parade disputes have, on occasion, requested assurances from the AOs that their discussions will remain entirely confidential and will not be disclosed to the Parades Commission.²²⁴ This derives from a fear that “anything you say may

Comm’n, Ballynaveigh District LOL No.10 (July 13, 1998) (unpublished determination, on file with authors).

²¹⁸ Parades Comm’n, Craigavon Protestant Boys Flute Band Parade in Lurgan (May, 6, 2000) (unpublished determination, on file with authors); Parades Comm’n, Castlederg Young Loyalist Flute Band in Castlederg (Apr. 18, 2001) (unpublished determination, on file with authors); Parades Comm’n, Ligonial Walker Club ABOD Parade in Belfast (July 12, 2003) (unpublished determination, on file with authors).

²¹⁹ E.g., Parades Comm’n, Silver Plains Flute Band Parade in Ballycastle (Sept. 30, 2002) (unpublished determination, on file with authors). *But cf.* Parades Comm’n, Castlederg Young Loyalist Flute Band in Castlederg (Sept. 12, 2002) (unpublished determination, on file with authors). This question is also directly relevant to the sequencing of steps which seek to advance a local resolution.

²²⁰ E.g., Parades Comm’n, Burntollet Sons of Ulster Flute Band Parade in Claudy (June 21, 2002) (unpublished determination, on file with authors).

²²¹ E.g., Parades Comm’n, Belfast Walker Club ABOD Parade in Belfast (Apr. 16, 2001) (unpublished determination, on file with authors).

²²² THE NORTH REPORT, *supra* note 62, at 143.

²²³ These conclusions derive from confidential interviews conducted by the authors.

²²⁴ *Id.*

be used in evidence against you.”²²⁵ In other words, reluctance to enter a process of mediation might be prompted by anxiety that anything said during the process might later be used against parties at the adjudicatory stage. We argue that, in order to build trust in the process and to keep open as many outcomes as possible, it is appropriate to prevent discovery of “mediation communications,”²²⁶ and that one possibility would be to include a nondisclosure or confidentiality provision in the Commission’s *Procedural Rules*.

It is important to note, however, that the Parades Commission does not have a monopoly on third-party interventions, and a number of external mediators have been involved in different situations. On occasion, mediative interventions have taken place concurrently with different organizations sponsoring different initiatives. This spawning of uncoordinated interventions potentially sustains a belief that if one initiative does not work, there will always be another available, possibly with a more sympathetic mediator. That said, the potential for independent mediators to facilitate truly communicative dialogue between disputing parties has recently been demonstrated in relation to two of the most contentious parades. In 2005, the Chief Executive of the Northern Ireland Community Relations Council, Duncan Morrow, was invited by the Parades Commission to facilitate private discussions between a leading Belfast Orangeman and a representative of a local residents’ group in advance of the Whiterock parade in July 2005.²²⁷ While no agreement was reached, and despite the violence in September 2005, this mediation process was restarted in 2006 and it seems likely that these talks—which ultimately again failed to reach full agreement—were important in preventing the escalation of the dispute in June 2006. It had also been agreed in the terms of the dialogue process that any agreements would be reported to the Commission, but (crucially) the discussions leading to those agreements would not. The Commission’s determination thus stated:

The Commission has heard that an understanding has been reached on the issues of music; size of the parade; and on flags to be displayed. In line with the terms of the dialogue process agreed at its outset, the Commission

²²⁵ *Id.*

²²⁶ See also Ellen E. Deason, *Competing and Complimentary Rule Systems: Civil Procedure and ADR: Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 562–565 (2005).

²²⁷ See *Orangeman Met with Republican*, BBC NEWS, June 30, 2005, http://news.bbc.co.uk/1/hi/northern_ireland/4638971.stm; see also *Orangemen should reject talks*, BBC NEWS, July 1, 2005, http://news.bbc.co.uk/1/hi/northern_ireland/4642155.stm.

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accepts the understanding reached on the issues during the process and has reflected this in its determination.²²⁸

Similarly, another independent mediator—Bob Fryer—was invited by the Parades Commission to initiate a mediation process for parades in the Ardoyne area of North Belfast. This resulted in an agreement over the Tour of the North parade²²⁹ and an agreement in relation to the morning parade past Ardoyne on July 12, 2006. The determination of the evening Ardoyne parade on July 12 read: “The Commission has heard that there is an understanding in relation to the morning parade on 12 July. We recognise this understanding and do not, therefore, place any restrictions on the morning parade.”²³⁰

These mediators, whilst funded by the Commission, do not report to the Commission on the substantive nature of the discussions. In many ways, therefore, this process of inviting independent external mediators to mediate particular disputes addresses the criticisms relating to neutrality and confidentiality, and aligns with recent recommendations for reform of the Commission.²³¹ The only remaining design problem concerns the way in

²²⁸ Parades Comm’n, No. 9 District LOL Parade Notified to Take Place in Belfast on Saturday 24 June 2006 ¶ 10 (2006), available at <http://www.paradescommission.org/Parades/index.cfm>.

²²⁹ See *Agreement Over Contentious March*, BBC NEWS, June 14, 2006, http://news.bbc.co.uk/1/hi/northern_ireland/5077756.stm.

²³⁰ Parades Comm’n, Ligoniel True Blues Parade ¶ 6 (July 12, 2006), available at <http://www.paradescommission.org/Parades/index.cfm>.

²³¹ The Northern Ireland Affairs Committee, for example, recommended that the mediation and determination functions of the Parades Commission should be clearly distinguished, and that the Commission should review and develop its role in mediation. See N. IR. AFFAIRS COMM., THE PARADES COMMISSION, H.C. 120-I, at para. 78 (2000–01). The Committee on the Administration of Justice (CAJ) gave a qualified endorsement of the proposal in the *Quigley Report* for a “stronger and more structured role for a facilitation function.” See CAJ’S RESPONSE TO SIR GEORGE QUIGLEY’S REVIEW OF THE PARADES COMMISSION AND PUBLIC PROCESSIONS (NORTHERN IRELAND) ACT 1998 ¶ 25, at 5 (Sept. 30, 2003) (on file with authors). CAJ also highlighted the importance of “the establishment of procedural safeguards such as the optional nature of the mechanism . . . and non-permeable walls between determination and facilitation.” *Id.* at ¶¶ 29, 32. The Northern Ireland Human Rights Commission stated that it “is generally in favour of the separation of the two functions of mediation/facilitation and adjudication.” See RESPONSE BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION TO THE QUIGLEY REVIEW ON THE PARADES COMMISSION AND PUBLIC PROCESSIONS (NORTHERN IRELAND) ACT 1998 ¶ 13, at 5 (Sept. 30, 2003) (on file with authors). Similarly, the Labour Relations Agency argued for “the organisational separation of the resolution function and the adjudication function” with an emphasis on codes of practice and operational

which the Commission should receive evidence from the parties *after* such externally facilitated mediation has finished if it too fails to generate agreement. At this stage, the Commission must issue a legal determination imposing restrictions on the parade and on the related protest, which may require the Commission to hear again from the parties. But if the parties believe they can cut a better deal with the Commission than is possible during mediated dialogue (that their interests would be better served at the “trial”), they might deliberately not reach an accommodation even in a mediation process facilitated independently of the Commission. It seems, therefore, that it will be important for the Commission to emphasize that any final hearing which takes place after mediation will not provide another opportunity for parties to explore the various options with the Commission. Rather, it is simply for parties to brief the Commission on what they perceive as the key issues and interests at stake, and for the Commission then to arrive at a binding legal determination. Preventing opportunities for dialogue in the adjudicatory process may provide an incentive to engage in genuine dialogue during mediation, even encouraging parties to play their best cards early and hastening a mutually acceptable accommodation.

IV. “CLARIFYING THE PUBLIC INTEREST”²³²

We have noted that institutional design is invariably culturally embedded. It was widely understood that the conflict over parades could not be dealt with within the peace talks and the Multi-Party (“Belfast” or “Good Friday”) Agreement. It was particularly clear in 1998, the year the Agreement was signed and also the year the Drumcree parade was rerouted, that the Parades Commission was acting to deflect an element of the conflict that might otherwise have engulfed and threatened the political talks and subsequent referendum. Thus, the Parades Commission has served as both an institutional stopgap (perhaps until municipal structures can be entrusted with these politically charged decisions) and a buffer (distancing new policing and governance structures from the potential tremors of parade disputes). Despite the transitional moment marked by the Belfast Agreement, there has not been

guidelines. See Letter from Bill Patterson, Chief Executive Labour Relations Agency to the Northern Ireland Office, Re. Quigley Review of the Parades Commission: Extension of Consultation Period ¶ 5 (May 9, 2003) (on file with authors).

²³² NONET & SELZNICK, *supra* note 4, at 109.

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an overnight transformation of policing²³³ and the devolved government has faced several crises since it was first established.²³⁴ The example of the Parades Commission thus cautions against placing unrealistic expectations on a single institution, and serves as a reminder that other fundamental institutional reforms may also be necessary.

In 1997, the North Review team surmised that, in five years time, it might be that “the overall political situation and inter-communal relations will have stabilised to the extent that some of the structures we recommend could be dismantled.”²³⁵ Instead, however, five official reviews of the Parades Commission have occurred in the space of six years (between November 1999 and March 2006)²³⁶ and the government has admitted that “Northern Ireland remains a deeply segregated society with little indication of progress towards becoming more tolerant or inclusive.”²³⁷ Furthermore,

²³³ See Mary O’Rawe, *Transitional Policing Arrangements in Northern Ireland: The Can’t and the Won’t of the Change Dialectic*, 26 FORDHAM INT’L L.J. 1015, 1035 (2003).

²³⁴ At the time of writing, the Northern Ireland Assembly remained suspended.

²³⁵ THE NORTH REPORT, *supra* note 62, at 204. This sentiment is echoed in the Commission’s guidelines. PARADES COMM’N, PUBLIC PROCESSIONS AND PARADES 2 (1999).

²³⁶ The first of these was an internal review conducted by the NIO. This was conducted between early November 1999 and late January 2000. N. IR. AFFAIRS COMM., THE PARADES COMMISSION, H.C. 120-II, at 86 (2000–01). The second was an inquiry by the Northern Ireland Affairs Select Committee, which was launched in March 2000, and reported in May 2001. N. IR. AFFAIRS COMM., THE PARADES COMMISSION, H.C. 120-II (2000–2001). The third was an independent review of the operation of the Commission and the *Public Processions (NI) Act* 1998 by Sir George Quigley. THE QUIGLEY REPORT, *supra* note 131. Sir George Quigley was appointed by the NIO on November 27, 2001, and submitted his report to the Secretary of State on September 27, 2002. The Secretary of State then set a period for public consultation on the Quigley recommendations—the initial deadline was January 31, 2003, but this was extended until April 30, 2003 meaning “that any new arrangements requiring legislation would not be in place until the 2005 marching season.” Northern Ireland Office, <http://www.nio.gov.uk/press/030206a.htm> (last visited Nov. 3, 2006). Ultimately, the government rejected the main recommendations of the *Quigley Report*. Fourth, was another inquiry by the Northern Ireland Affairs Select Committee, N. IR. AFFAIRS COMM., THE PARADES COMMISSION AND PUBLIC PROCESSIONS (NORTHERN IRELAND) ACT 1998, H.C. 172-I (2004–05), and most recently, the ongoing NIO consultation on mediation measures for disputed parades (NIO, MEDIATION MEASURES FOR PARADES IN NORTHERN IRELAND (2005), *available at* http://www.nio.gov.uk/mediation_measures_for_parades_in_northern_ireland_-_a_consultaion_document.pdf).

²³⁷ COMMUNITY RELATIONS UNIT, OFMDFM A CONSULTATION PAPER ON IMPROVING RELATIONS IN NORTHERN IRELAND ¶ 1.3, at 4 (2003); *see* NORTHERN

the findings of a survey in 2001 revealed that only 35% of Catholics and 8% of Protestants felt the Parades Commission had improved the situation, with 50% of Protestants and 14% of Catholics believing that the Commission had actually made the situation worse.²³⁸ An earlier survey in 1999 found that only fifteen of those questioned believed that the Commission was successful, and it would therefore appear that little, if any, progress has been made.²³⁹ Yet, these public attitude findings are not surprising given the Commission's inability to draw upon the normal forms of legitimacy in a democratic society.

It might be argued that the cost of policing certain parades, or indeed, the entire marching season, can provide a more reliable indicator of progress. Such an analysis suggests that some progress has been made since the Commission's establishment. In the years 1998, 1999, and 2000, the cost of policing the protest at Drumcree in July was £11 million, £6 million, and £5.5 million, respectively.²⁴⁰ This downward trend has continued—in 2000, the Average Daily Hours (ADH) of police overtime peaked in July with 22,800 ADH. In 2001, this figure decreased to 20,500 ADH, while in 2002 the July peak was lower again at 17,300 ADH.²⁴¹ Furthermore, during the period July to December 1998, the monthly cost of maintaining a police presence at Drumcree was approximately £0.4 million,²⁴² whilst by 2002, this monthly post-July premium had reduced to £54,250.²⁴³ On the first Saturday in July 2003 and 2004, "[t]he PSNI costs of security arrangements

IRELAND SOCIAL ATTITUDES SURVEY (1989–1996), *available at* <http://cain.ulst.ac.uk/othelem/research/nisas/nisas.htm>; NORTHERN IRELAND LIFE AND TIMES SURVEY (1998), *available at* <http://www.ark.ac.uk> (suggesting a recent deterioration in community relations through monitored attitudes of the population).

²³⁸ NORTHERN IRELAND STATISTICS AND RESEARCH AGENCY, OMNIBUS SURVEY (2001), *reprinted in* PARADES COMM'N, THIRD ANNUAL REPORT 2000–2001, at 30–32 (2001).

²³⁹ RESEARCH AND EVALUATION SERVICES SURVEY (1999), *reprinted in* PARADES COMM'N, SECOND ANNUAL REPORT 1999–2000, at 25–26 (2000).

²⁴⁰ Memorandum from the Royal Ulster Constabulary, *in* N. IR. AFFAIRS COMM., THE PARADES COMMISSION, H.C. 120-II at 70 (2000–01).

²⁴¹ PSNI CHIEF CONSTABLE'S ANNUAL REPORT 2001–2002, at 14 (2002).

²⁴² 325 PARL. DEB., H.C. (6th ser.) (1999) 480 (responding to written question 69882 by Kevin McNamara); *see also* 329 PARL. DEB., H.C. (6th ser.) (1999) 535 (responding to written question 80914 by Mr. MacKay).

²⁴³ 631 PARL. DEB., H.L. (5th ser.) (2002) WA90 (responding to question HL 2209 by Lord Eames).

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for the parades of Portadown Loyal Orange Lodge No. 1 to Drumcree Church" were £221,810 and £177,437, respectively.²⁴⁴

The cost of policing the disorder which followed the restricted Whiterock parade in September 2005, however, has been estimated at over £3 million.²⁴⁵ This suggests that there is little room for complacency. Indeed, the utility of these bare figures as a progress indicator is questionable. The cost of policing parades and protests is contingent upon police-community relations, and these are influenced by many factors other than the parades issue (not least of all, political attitudes towards the police service itself).²⁴⁶ Furthermore, simply measuring the cost effectiveness of the policing operation says nothing of the principles upon which decisions are made, and whether those decisions are likely to lay the foundation for a shared future.²⁴⁷

We framed this case study by asking the broader question of whether ADR mechanisms could serve to deepen democratic dialogue. While Northern Ireland's transitional context might suggest that straightforward parallels should not be drawn with institutional design decisions in more stable settings, our broad conclusions do not presuppose any particular cultural or institutional starting point. We suggested that the concept of

²⁴⁴ 631 PARL. DEB., H.L. (5th ser.) (2002) WA172. Approximate costs of policing the Tour of the North Orange march in Belfast (the route of which changes on alternate years, resulting in different deployments) were £64,390 in 2004 and £74,533 in 2005. 435 PARL. DEB., H.C. (6th ser.) (2005) 1325W (responding to question 7148 by Lady Hermon).

²⁴⁵ *Policing Parade Trouble Cost £3m*, BBC NEWS, Oct. 31, 2005, http://news.bbc.co.uk/1/hi/northern_ireland/4394158.stm.

²⁴⁶ Parades Comm'n, Parkmount Junior LOL No.150 Parade in Portadown (May 25, 2002) (unpublished determination, on file with authors). Significantly, in July 2006, a senior member of Sinn Féin, Gerry Kelly, held talks with senior police officers to discuss the policing arrangements for the July 12 parade in Ardoyne in North Belfast. *Praise After Peaceful Twelfth*, BBC NEWS, July 13, 2006, http://news.bbc.co.uk/1/hi/northern_ireland/5175356.stm. This, despite the fact that Sinn Féin has so far refused to sit on the Policing Board or to take part in local District Policing Partnerships arguing that the changes to the RUC recommended by the Patten Report have not yet been fully implemented. *See, e.g., Rea is Re-elected Board Chairman*, BBC NEWS, April 6, 2006, http://news.bbc.co.uk/1/hi/northern_ireland/4880342.stm.

²⁴⁷ For example, the cost of upholding the Parades Commission's decision in 1998 to prevent Portadown Orangemen from parading along the Garvaghy Road was greater than had been the (direct) cost of facilitating the parade in previous years. In the three years prior to the enactment of the PPA, the cost of police manpower directly employed in policing the Drumcree parade was £960,000 in 1995, £2,110,000 in 1996, and £680,000 in 1997. 314 PARL. DEB., H.C. (6th ser.) (1998) 251 (responding to question 44749 by Mr. Salter).

“democratic triangulation”—with ADR mechanisms mediating between state institutions/public policy and cultural values—holds open the prospect that new fora for dialogic interaction can catalyze and consolidate advances toward a more peaceful society. This occurs first, by animating the reform of insensate institutions, and second, by facilitating more inclusive dialogue about the normative values underpinning public policy (whether community relations, shared space, or how best to realize basic human rights standards). The Parades Commission has had some success at both levels. In relation to animating reform of existing institutions, new models of policing have been developed which take a more holistic view of the policing of public space. Rather than merely resorting to the usual tools of public order policing, the use of mediative practices, monitoring and marshalling as part of an integrated package has offered a much wider range of possibilities for managing (and even preventing) conflict. With regard to facilitating more inclusive dialogue, certainly, the establishment of the Parades Commission has provided greatly enhanced opportunities for parties to make representations to the decisionmaking body, and to engage in meaningful discussion about the management of public events. It is unfortunate that not all parties have availed of these channels. While there is room for improvement, the structure of the Parades Commission has ensured that more adversarial processes remain a last resort. Thus, through innovative institutional and procedural design, the Commission demonstrates that law can provide a framework which is attuned to inputs as much as outputs. In doing so, it maximizes the potential for pragmatic accommodations which recognize all the interests at stake.

Yet, there is no necessary correlation between the quantity of democratic participation and the quality of democratic deliberation. While the creation of the Parades Commission has undoubtedly extended the means for building mediative capacity, opportunities to stimulate greater consensus around the underlying interests, values and norms at stake have been missed. Two factors in particular have inhibited the Commission’s contribution to deepening democracy. First, the Parades Commission has not done enough to stimulate the background consensus which Habermas views as critical to moving parties from strategic to more communicative action.²⁴⁸ Without this consensus, the vocabularies of community relations and human rights will remain contested. We argue that this framing, or clarifying, of the public interest is an essential strand in deepening Northern Ireland’s post-conflict democracy. Greater openness and transparency in the adjudicatory process should accelerate the prospect of resolution by holding parties accountable to

²⁴⁸ See THEORY OF COMMUNICATIVE ACTION, *supra* note 18.

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their public transcript and limiting the potential for strategic maneuvering. Second, the bargaining work of the AOs has been constrained by the institutional design. While the AOs have become very skilled in engaging with different individuals and groups, and have been able to play a key role in deescalating tensions and reducing the likelihood of violence, greater attention must be devoted to devising structures which ensure both the neutrality of mediators and the confidentiality of the process. This might involve retaining the capacity to carry out the evidence gathering and pre-dialogic work presently undertaken by the AOs, but it also suggests there is a need to avail of independent mediators—possibly following the example of the independently facilitated initiatives in the Whiterock and Ardoyne disputes. Such mechanisms could help redeem the concept of mediation and add depth to the substance of any engagement that occurs, with positive ramifications for democratic consolidation.

